

THE
CONTRACT OF AFFREIGHTMENT
AS EXPRESSED IN
CHARTERPARTIES
AND
BILLS OF LADING

BY
SIR THOMAS EDWARD SCRUTTON,
ONE OF THE LORDS JUSTICES OF HIS MAJESTY'S COURT OF APPEAL;
AUTHOR OF "THE LAWS OF COPYRIGHT"; "THE MERCHANT
SHIPPING ACT, 1894," ETC.

ELEVENTH EDITION

BY
SIR T. E. SCRUTTON,
AND
F. D. MACKINNON, M.A.,
OF TRINITY COLLEGE, OXFORD, AND OF THE INNER TEMPLE.
ONE OF HIS MAJESTY'S COUNSEL.

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A. L. SMITH was a pupil of JAMES HANNEN (1821-1894).

J. HANNEN was a pupil of THOMAS CHITTY (1802-1878).

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*W. TIDD was a pupil of CHARLES RUNNINGTON (1751-1821).

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PREFACE

TO THE ELEVENTH EDITION.

THE necessity for a new edition of this book has arisen from the fact that all copies of the last edition have been sold. The development of the law in the interval would not in itself have made a new edition necessary. Nevertheless, some sixty new cases require notice. On the other hand, recent legislation has rendered the previous contents of Articles 77 and 89A practically obsolete, and the list of cases, already lamentably long, can be reduced a little by the omission of those which have thus ceased to be material.

We have received most valuable assistance from Mr. W. L. McNair, of Gray's Inn, in the preparation of this edition, which we gratefully acknowledge.

There is at present before Parliament a Bill to amend the law with respect to the carriage of goods by sea. If it becomes law, it will require almost all bills of lading to incorporate certain provisions as to liability, and will effect considerable alterations in the law as stated in these pages. As it is not proposed that it shall become law till some uncertain date after September 30, 1923, we have decided, in view of the uncertainty of parliamentary events, not to delay the issue of this edition.

But we trust that the proposed legislation will receive the most careful consideration in Parliament. It proposes to make compulsory, in certain contracts of carriage, certain rules as to liability, and to make it a criminal offence to come to an agreement not in accordance with these rules. Of course, if commercial men have agreed to these rules, no legislation is necessary; they can make

contracts in accordance with their agreement. The demand for legislation assumes that there are people who have not agreed, and who, unless there is legislation, will make contracts not in accordance with these rules.

International conferences and agreements have in the past made valuable contributions to uniformity of practice. For instance, the York-Antwerp Rules as to General Average are voluntarily incorporated in many bills of lading, but it has never been suggested to make them compulsory. If there is any value at all in freedom of contract, it should not be interfered with except after full deliberation and the most urgent necessity.

The present Bill recites that an International Conference agreed to recommend to the respective Governments, as the basis of a convention, a certain draft convention. It does not recite, as is the fact, that "many of the delegates had not received instructions from their Governments as to the attitude they should take on this subject" [Report of British Delegates 18 (b)], or that the delegates, in agreeing to recommend certain scheduled rules as the basis of a convention, contemplated further meetings or diplomatic discussion to decide its exact terms. These further meetings or discussions do not appear to have taken place, so there is, at present, no certainty that any foreign Power will agree to the terms it is proposed to make compulsory on British citizens.

Further, the rules are supposed to carry out some agreement between shipowners and shippers. There has been considerable vagueness as to what this agreement is, and who has agreed to it. After certain rules had been discussed at The Hague in 1921, it was discovered that certain gentlemen purporting to represent the whole of the cargo interests did not do so, and they were repudiated by their supposed constituents. It is doubtful at present whether the Coasting Trade has been consulted, or its

PREFACE.

circumstances even considered, by the distinguished ship-owners who have purported to represent shipping.

The Annual Report of the Liverpool Steamship Owners' Association for 1923, at p. 13, states, "The Rules are a new departure. They constitute an International Code framed to secure, on certain points, uniformity in the interests of those engaged in international commerce. If the lawyers of all nations will interpret them as they are understood by the traders and shipowners of all nations, the Rules will serve a useful purpose; but if the lawyers of each nation seek to read into the Rules the laws and practices of their own country, the Rules will serve no useful purpose, as uniformity will not be established."

This is a terrifying prospect. How are English judges and lawyers, bound to administer the English statute and common law, to ascertain how "the traders and shipowners of all nations understand" an English Act of Parliament? For instance, in the very odd Article 6, recognising in circumstances very difficult to ascertain a bill of lading not conforming to the scheduled rules, but not negotiable, appears the phrase, "agreement in any terms as to his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy." How is an English Court to ascertain, as the Report suggests, what "the traders and shipowners of all nations understand" by this? Again, in Article 4 (4) "any reasonable deviation" is not to be deemed to be a breach of the contract of carriage. What do the "traders and shipowners of all nations" understand to be covered by this? If a selection of them were separately asked what it meant, does anyone suppose that any uniform answer would result?

We hope to have said sufficient to show that the proposed legislation requires the most careful attention of Parliament, not to say the reconsideration of those who think they have agreed to it. The proposed rules are full

of legal difficulties, and are likely to give rise to extensive and expensive litigation when individual shipowners and traders find out to what various well-meaning persons have, without due consideration, committed them. It would lengthen this preface unduly to go through the rules in detail, but we take one instance. A very frequent commercial transaction is the charter of a ship by a goods-owner to carry a whole cargo. If a bill of lading is issued to the charterer it is usually in effect only a receipt, not varying the terms of the charterparty. If the charterer sells the goods afloat, he may pass the property by endorsing the bill of lading to the purchaser. The bill of lading will then become a contract of carriage with the shipowner. The proposed rules (Article 5) say, "The provisions of these rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these rules." The definition of "contract of carriage" only includes a bill of lading issued under a charterparty "from the moment at which such bill of lading is negotiated." Is it an offence for a shipowner to issue a bill of lading, not in accordance with the rules, to the charterer, which is not negotiated? Does the bill of lading become illegal when the charterer negotiates it? And if so, does the negotiation by the charterer make the shipowner guilty of an offence in issuing it? What is "the understanding of the traders and shipowners of all nations" about this, and what do the eminent legal authorities who are introducing the Bill mean on this point?

Again, when the rules are enacted, under Article 5, the carrier may surrender his rights under them. May the goods-owner surrender his rights under them? If not, why this difference between the shipowner and shipper? If he can, what becomes of the compulsory character of the rules?

The truth is that the vital commercial question is not the distribution of liability, but the freight to be charged for it. There is a risk in all carriage by sea; that risk can be insured at a premium. If all the risk falls on the shipowner, he will have to insure, and will want a higher freight to cover the costs of insurance. If all risk falls on the goods-owner he will have to insure, and will pay less freight because he is not paying in the freight for insurance. When you have settled the division of liability, you have not settled the freight payable, which will still in individual cases depend on bargaining, though, in the long run, the average freight will reflect the incidence of liability.

Should this work reach another edition, it may be necessary to consider in detail the rules, if any, enacted by Parliament. We sincerely hope, however, that the matter may remain as it now rests, on the bargaining of parties free to contract.

T. E. S.

F. D. M.

20 April, 1923.

ADDENDA.

Pages 39, 40, 42. The appeal in *Ariadne S.S. Co. v. McKelvie* has been dismissed in the House of Lords.

Page 96. Seaworthiness—competent master, not instructed in a particular matter by owners—see *Standard Oil Co. v. Owners of Clan Gordon*, (1923) Sc. L. T. 130.

Page 108, footnote (d). See also *per* Lord Sumner, *Akt. Nord-Ostero v. Cusper*, (1923) 14 Ll. L. R. at p. 206.

Page 161. (*cf.* *The Santamaria*, (1923) 14 Ll. L. R. 159.

Page 320, footnote (a). See also the Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. V. c. 41).

Page 364. See also *United States Shipping Board v. Durell*, (1923) 28 Com. Cas. 163; reversed in the Court of Appeal on the point decided by the Judge below, but a new trial ordered on the question of prevention in fact.

Page 493, *Royal Exchange Co. v. Kingsley Co.*, (1923) A. C. 235. Query as to the effect of § 502 (i) and § 509 of the Merchant Shipping Act, 1894, if the fire was without the actual fault and privity of the owners, but only by the fault or neglect of their servants? The point apparently was not raised, and on the facts found may have been irrelevant, but seems to be material upon a *dictum* at the bottom of p. 245 of the judgment.

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ALPHABETICAL GUIDE TO CASES.

IN the illustrations contained in the following pages an attempt has been made to lessen the labour of mastering the facts by using particular letters to represent particular characters in the case. Thus, except in a few cases where they obviously stand for places, A is always a shipowner, C a charterer, G a consignee; X is always the port of loading; Z the port of discharge.

| | | |
|--------|---|---------------------------------|
| A | = | shipowner. |
| B | = | shipowner's agent. |
| C | = | charterer. |
| D | = | charterer's agent. |
| E | = | captain. |
| F | = | shipper. |
| G | = | consignee. |
| H I | } | indorsees of bill of lading. |
| P | = | purchaser of goods shipped. |
| R S | } | ships. |
| V | = | unpaid vendor of goods shipped. |
| W | = | agent of such a vendor. |
| X | = | port of loading. |
| Y | = | port of call, or of refuge. |
| Z | = | port of discharge. |

THE CONTRACT OF AFFREIGHTMENT.

SECTION I.

NATURE AND CONSTRUCTION OF THE CONTRACT.

Article 1.—Nature of the Contract.

WHEN a shipowner or person having for the time the right as against the shipowner to make such an agreement, agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a *contract of affreightment*, and the sum to be paid is called *freight*.

When the agreement is to carry a complete cargo of goods, or to furnish a ship for that purpose, the contract of affreightment is almost always contained in a document called a *charterparty* (a), the shipowner letting

(a) As to stamps on charters, see 54 & 55 Vict. c. 39, ss. 15, 49-51; Appendix III. Charters made entirely abroad can be stamped within two months of their receipt in this country. *The Belfort* (1884), 9 P. D. 215. Bills of lading made abroad need not be stamped at all. •See *post*, p. 457.

Charterparty: in mediæval Latin, *carta partita*, an instrument written in duplicate on a single sheet and then divided by indented edges, so that each part fitted the other, whence the term "*indenture*"; only now used for this particular kind of shipping document; the first use given in the N. E. D. is in 1539. The phrase "*Chartre de freight ou indenture*" is used as early as 1375. (Black Book of the Admiralty, Monumenta Juridica, ed. Twiss, 1871, Vol. I., p. 136.)

Formerly a charterparty was made by deed. "A charterparty is usually under seal." (Chitty on Pleading, 1816, Vol. III., p. 93.) Still earlier, "Charterparties . . . are made before Notaries or Scrivenors," Malynes, *Lex Mercatoria* (1686), p. 99. As late as 1830 a report says that it was arranged "that the defendant's attorney should prepare a charterparty." (*Read v. Rann*, 10 B. & C. 439.)

the ship for the purpose of carrying, or undertaking to carry, the *charterer* hiring the ship for such purpose, or undertaking to provide a full cargo.

Such document is usually signed before any steps are taken under the contract it contains.

When the agreement is to carry goods which form only part of the intended cargo of the ship, the contract of affreightment as to each parcel of goods shipped may also be expressed in a charterparty, but is more usually evidenced by a document called a *bill of lading* (*b*), which serves also as a receipt by the shipowner, acknowledging that the goods have been delivered to him for a certain purpose. A bill of lading is rarely signed until some steps have been taken in pursuance of the contract it evidences.

By the custom of merchants indorsement of the bill of lading may pass the property in the goods, for the shipment of which it is a receipt; and by statute such an indorsement will also confer on the indorsee the same rights and liabilities as if the contract evidenced in the bill of lading were originally made with him (*c*).

The charterer with whom the shipowner enters into the contract of affreightment may intend to supply the cargo himself. In this case, when the cargo is shipped, a bill of lading will almost always be signed, which is usually, while in the hands of the charterer, merely a receipt for the goods, but which may be evidence of a contract adding to or varying the contract between them contained in the charterparty (*d*).

Or the charterer may intend to enter into sub-contracts of carriage with other shippers, who provide all or part of the cargo. In this case, as each shipper ships

(*b*) Also once called a *bill of loading*; the first use given in the N. E. D. is in 1599. A bill of lading, like a charterparty, used to be by "Indenture." See an example of 1538 ("This bylle indented and made, etc.") in Marsden, *Select Pleas of the Admiralty Court* (Selden Society, 1892), Vol. I., p. 61.

(*c*) See Section V., *post*, Articles 57, 58, 75.

(*d*) See Article 18, *post*; and *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67.

his goods, a bill of lading will be signed, evidencing a contract between the shipper on the one hand, and, according to circumstances, the shipowner or charterer on the other, but usually the shipowner. Such contract will be independent of the contract contained in the charterparty, except in so far as it expressly incorporates it (e).

Note. 1.—A form of contract came into use many years ago on the Danube called a *Berth-note*. It varied in form very much, but was intended by the brokers who invented it to free them from liability for freight and demurrage, while giving them the right to engage cargo for the ship at a profit. A singularly involved specimen of this document came before the Court in *S.S. Rotherfield v. Tweedy* (f), and was held to make the broker a charterer. Ships in the Australian trade are put on the berth by loading brokers, whose rights and duties are not very clearly defined (g).

In coal-ports a form of contract called a *Colliery Guarantee* has for years been in constant use. The charter provides that the ship shall be loaded in accordance with the colliery guarantee. The charterer then obtains from the colliery who are to supply the cargo a contract to load the ship on certain terms; this guarantee is sometimes addressed to the charterer, sometimes to the shipowner (h). These transactions are usually treated by the Courts as a contract between shipowner and charterer that the charterer shall load the ship in accordance with the terms of the colliery guarantee (i); but in some cases the documents appear to amount to an acceptance by the shipowner of the liability of the colliery in substitution for that of the charterer. Questions also arise as to how much of the colliery guarantee is incorporated in the charter. In *Weir v. Pirie* (1st case) (k), the arbitration clause in the guarantee was held to be incorporated in the charter; but on a different charter in *Clink v.*

(e) See Articles 18, 19 *post*.

(f) (1897), 2 Com. Cases, 84.

(g) See *Nitrate Producers Co. v. Wills* (1905), 21 Times L. R. 699 (H. L.).

(h) As to what is good tender of a colliery guarantee, see *Dobell v. Green*, (1900), 1 Q. B. 526. As to loading on terms of "usual colliery guarantee" at Grimsby, see *Shamrock S.S. Co. v. Storey* (1899), 5 Com. Cases, 21.

(i) *Monsen v. Macfarlane* (1895), 2 Q. B. 562; *Thorman v. Dowgate S.S. Co.*, (1910) 1 K. B. 410.

(k) (1898), 3 Com. Cases, 263.

Hickie Borman (l), the arbitration clause was held not to be incorporated, as also in a case in which the charterers repudiated the charterparty (m).

Note 2.—A contract may be of such a nature as that one party may be entitled to perform his obligations under it vicariously (n), or it may be of such a nature that he must perform them personally (o). A charterparty, as regards the shipowner's obligations, is of the latter class (p). It follows that if a man contracts as "owner" to provide a ship or ships under a charterparty he will, in the absence of anything in the charter to indicate the contrary, be bound, and entitled, to provide his own ship or ships, and cannot, and need not, provide a ship he has chartered (q). A common alternative form is to contract as "Freight contractor," or "Chartered owner," or "Disponent," in which case chartered ships may or must be provided (r).

Article 2.—Nature and Effect of a Charterparty.

A charter may operate as a demise or lease of the ship itself, to which the services of the master and crew may or may not be superadded. The charterer here becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him (s).

(l) (1898), 3 Com. Cases, 275.

(m) *Weir v. Pirie* (2nd case) (1898), 3 Com. Cases, 271.

(n) *British Wagon Co. v. Lea* (1880), 5 Q. B. D. 149. Such a contract is sometimes said to be "assignable," a word more accurately limited to the right to transfer the rights, not the obligations, of a contract.

(o) *Kemp v. Baerselmann*, (1906) 2 K. B. 604.

(p) *Dimech v. Corlett* (1858), 12 Moo. P. C. 199 at p. 223; Lord Denman, C.J., in *Humble v. Hunter* (1848), 12 Q. B. at p. 317; *Fratelli Sorrentino v. Buerger*, (1915) 3 K. B. 367. In the last case the shipowner succeeded because upon the facts it was found that he was ready to perform personally and not vicariously. See also *Isaacs v. McAllum* (1921), 3 K. B. 377.

(q) *Cf. Alquife Mines v. Miller*, Lloyd's List, 13th May, 1918.

(r) *Cf. Phosphate Co. v. Rankin* (1915), 21 Com. Cas. 248. So also if the contract is by "agents or owners" of ships to be named; *Cork Gas Co. v. Witherington* (1920), 36 T. L. R. 599.

(s) *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86, 96. The language in the text is that of Cockburn, C.J. Lord Esher in *Baumvoll v. Gilchrest*, (1892) 1 Q. B. at p. 259, prefers to put it thus:—"the question" (whether an owner was liable for acts of the captain of his

Or it may be that all that the charterer acquires by the charter is the right to have his goods conveyed by a particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the owner's master and crew. In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership and also the possession of the ship remain in the original owner, through the master and crew, who continue to be his servants.

If the owner's master, by agreement of the owner and charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owner, and such agreement may not free the owner from liability to a third party on bills of lading signed by the master (*t*).

Note.—The modern tendency is against the construction of a charter as a demise or lease (*u*). Nearly all the cases of demise are old cases, and their authority has been somewhat shaken by modern decisions. But each case must turn on the particular terms of the charter. The chief results of the construction of a charter as a demise would be: (1) that the owner, being out of possession, would have no lien at common law for the freight due under the charter; (2) he would not be liable to shippers, even if they did not

ship) "depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship." *Cf. per Lopes, L.J.*, at p. 261. This view is approved by the House of Lords in the same case; (1893) A. C. 8. *Cf. also Wehner v. Dene S.S. Co.*, (1905) 2 K. B. 92.

(*t*) *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86, 96; *Baymroll v. Gilchrist & Co.*, (1893) A. C. 8; *Manchester Trust v. Furness, Withy & Co.*, (1895) 2 Q. B. 539 (C. A.); and see Article 18.

(*u*) "It is very rarely that a charterparty does contain a demise of a ship." *Vaughan Williams, L.J.*, *Herne Bay Co. v. Hutton*, (1903) 2 K. B. at p. 689. The influence of the older system of demise survives in phrases still used, *e.g.*, in the provision as to "redelivery" in a time charterparty, under which the ship in fact is at all times in the possession of the shipowner. *Cf. Italian State Railways v. Mavrogordatos*, (1919) 2 K. B. 305.

know of the charter, or to the charterer, for acts of the master and crew (*v*); (3) the master would be the agent of the charterer, so that delivery to him of goods bought by the charterer would, unless the bill of lading was made deliverable to shipper or order, divest the unpaid vendor's right of stoppage *in transitu*. Under a charter not a demise, the master would be a mere carrier, and not the charterer's agent, and the right of stoppage would remain (*x*). (4) If a chartered ship earned salvage, the salvage reward would go to the charterer if the charter were a demise (*y*); to the owner if the charter were not a demise (*z*). (5) Under a charter by demise the charterer would have the benefits conferred on an "owner" by sects. 502 and 503 of the Merchant Shipping Act, 1894 (*a*); under a charter not by demise the charterer who himself contracts as carrier by a bill of lading would not have those benefits. (6) Where statutory duties are imposed on the "owner" of a ship, such as the duty of paying for the burial of cattle washed ashore from a ship or wreck, in the absence of express provisions in the charter, the charterer would be liable if the charter were a demise, the owner if it were not (*b*). Lord Esher's judgment in *Baumvoll v. Gilchrest & Co.* (*c*) suggests that the true distinction between the two classes of charter is whether the owner has for the time parted with "the whole possession and control of the ship."

I. Cases in which a charter has been held *not* to be a demise.

Case 1.—A. chartered a ship to C., to sail to X., and load, from C.'s agent there, cargo to be stowed at merchant's risk and expense. The captain to sign bills of lading if required at any rate of freight without prejudice to the charter.

At X. goods were shipped by shippers who knew nothing of the charter under a bill of lading signed by the master.

(*v*) Cf. *Baumvoll v. Gilchrest & Co.*, (1893) A. C. 8.

(*x*) *Berndtson v. Strang* (1868), L. R. 2 Ch. 588; *Ex parte Rosevear China Clay Co.* (1879), L. R. 11 Ch. D. 560. *Vide post*, Articles 68, 69.

(*y*) See *Elliott Tug Co. v. Admiralty*, (1921) 1 A. C. 137.

(*z*) *Vide post*, Article 121.

(*a*) *The Steam Hopper No. 66*, (1908) A. C. 126.

(*b*) Cf. *The Steam Hopper No. 66*, (1908) A. C. 126; *Trinity House v. Clark* (1815), 4 M. & S. 288; *post*, p. 9. On the liability of a ship *in rem* for a collision, when the charter amounts to a demise, see *The Tasmania*, (1888) 13 P. D. 110; and Article 122, *post*. On the personal liability of the owner of a ship proceeded against *in rem*, see *The Dictator*, (1892) P. 304.

(*c*) (1892) 1 Q. B. 253; (1893) A. C. 8.

Held, that A. had not parted with the possession* of the ship; that the master was still A.'s servant, and that his signature to a bill of lading bound A. That the stowage of goods was by a stevedore appointed by the charterers, though ultimately paid by the owners, made no difference (d).

Case 2.—A. entered into a charter with C. that his ship being staunch, "and so maintained by owners shall be placed under the direction of the charterer" for conveyance of goods within specified limits. "The steamer to be let for the sole use of charterers and for their benefit for six months. . . Charterers to have whole reach of hold and usual places of loading, room being reserved to owners for crew. . . Captain to use dispatch in prosecuting voyage, and crew to render customary assistance in loading; captain to sign bills of lading. . . and to follow the instructions of the charterers as regards loading. . . coals at cost of charterers, owners finding all ship's stores, and paying crew's wages. . . captain to furnish charterers with log and to use sails when possible to save coals. . . vessel to be returned at end of period by charterers."

As a fact, A. paid the master and crew.

Held, that there was no demise; and that A. was still responsible for acts of the master and crew, both to the public and to C. (e).

Case 3.—A., registered as the "managing owner" of a ship under the Merchant Shipping Acts, made an agreement with E., the master, that E. should take the ship wherever he chose, shipping whatever cargo he thought fit, engaging the crew, and paying A. one-third of the net profits. A. under this agreement had no control over the vessel. E. made a charter, which A. knew nothing about, with C., "between E., master for and on behalf of the owners." *Held*, that this arrangement did not amount to a demise to E., but that A. still remained liable to the public as "managing owner" (f).

Case 4.—C. hired a steamer for the day from A., who sent him this memorandum: "I note that the S. is engaged to you for X. for May 28, at hire per day of £5, your party not exceeding fifty

(d) *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86. If A. had parted with the possession and control of the ship, he would not have been bound by the acts of a master who was not his servant, even to shippers ignorant of the charter. *Baumvoll v. Gilcrest*, (1892) 1 Q. B. 253; (1893) A. C. 8. But a clause that the captain in signing bills of lading shall be the charterer's servant, will not free the owner from liability on such bills of lading to shippers ignorant of the clause. *Manchester Trust v. Furness, Withy & Co.*, (1895) 2 Q. B. 539 (C. A.). *Steel v. Lester*, *vide post*, is explained in that case by Lopes, L.J., (1892) 1 Q. B. at p. 261, as turning on the owner's appointment of, and power of dismissing, the captain.

(e) *Omoa Coal and Iron Company v. Huntley* (1877), 2 C. P. D. 464.

(f) *Steel v. Lester* (1877), 3 C. P. D. 121; cf. *Associated Cement Co. v. Ashton*, (1915) 2 K. B. 1; see also *Christie v. Lewis* (1821), 2 B. & B. 410, and *Saville v. Campion* (1819), 2 B. & Ald. 503; and compare with *Newberry v. Colvin* (1832), 1 Cl. & F. 283.

persons." A. employed and paid the master and crew who navigated the vessel. *Held*, that C. had no such exclusive possession as to justify him in expelling a stranger who came on board by consent of the captain, though he could sue A. for breach of contract (g).

II. Cases in which it was held that the charter amounted to a demise.

Case 5.—A. by deed appointed E. to command a ship on a certain voyage, paying a certain freight to A. and retaining the surplus for himself; A. had a super-cargo on board with power to supersede E. if he misconducted himself. By another instrument E. was to be paid wages by A. The deed or charter was made *bonâ fide*, and persons who shipped goods were aware of it. *Held* (by the House of Lords), that E. was owner of the ship *pro tempore*, and was alone liable to shippers on the bill of lading (h).

Case 6.—A. had purchased a ship for the purpose of selling it to C. under an agreement which provided for payment of part of the purchase-money down, and part at the expiration of a charter of the same date. Under this charter A. agreed to let and C. to hire the steamer for four months, the charterer to provide and pay for provisions and wages of captain, officers, engineers, and crew; owner to pay insurance and maintain steamer in an efficient condition during service; charterers to provide and pay for coal, port-charges, pilotage, etc. Payment for use and hire of vessel at rate of £750 per calendar month, hire to continue until delivery of ship to owners, unless lost. Owner has option of appointing chief engineer, to be paid by the charterers. Owner to have lien on cargoes for freights due under charter.

C. appointed and paid captain, officers, and crew; A. appointed chief engineer. A. was registered as owner and managing owner.

Held, that A. had parted with the possession and control of the vessel, so that he was not liable to shippers ignorant of the charter on bills of lading signed by the master (i).

Case 7.—A. chartered a ship to C. "to be placed under the direction of C.," to be employed within certain limits as ordered by C. "The said steamer is let for the sole use of C. and for his benefit for three or more calendar months at C.'s option, he having the whole reach and burden of the vessel, freight payable till the vessel is again returned by C. C. to supply coals and pay all wages, expenses, etc., except insurance. The vessel to be delivered up to A. on the termination of the charter, in the same good order and condition as when delivered." *Held*, to amount to a demise of the ship to C. (k).

(g) *Dean v. Hogg* (1834), 10 Bing. 345; *cf. Herne Bay Co. v. Hutton*, (1903) 2 K. B. 683; see also *Lucas v. Nockells* (1828), 4 Bing. 729.

(h) *Newberry v. Colvin* (1832), 1 Cl. & F. 283.

(i) *Baumvoll v. Gilcrest*, (1893) A. C. 8. See Article 18, *infra*, and *Belcher v. Capper* (1842), 4 M. & G. 502.

(k) *Meiklerid v. West* (1876), 1 Q. B. D. 423.

Case 8.—A. “granted and to hire and freight let” his ship to the Crown for transport for three months, and afterwards for so long as required. The master and crew were employed and paid by A. *Held*, that the Crown was temporarily owner, so that A. was not liable for light dues to be paid by “the owners of ships”; and that the master and crew were only employed by A. to enable the Crown to enjoy its ownership to the best advantage (l).

Article 3.—The Bill of Lading.

A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship. It is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract (m).

The terms of the contract may also be gathered from the charter, where there is one and either some or all of its terms are expressly incorporated in the bill of lading, or where the charterer is also the shipper, in which latter case the bill of lading is as between charterer and ship-

(l) *Master of Trinity House v. Clark* (1815), 4 M. & S. 288. This case, as also *Frazer v. Marsh* (1811), 13 East, 238, and *Hutton v. Bragg* (1816), 7 Taunton, 14, have been so much distinguished and doubted, especially in *Christie v. Lewis* (1821), 2 B. & B. 410, and *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86, that they cannot be considered of much authority. Lord Ellenborough’s language in *Frazer v. Marsh*, laying stress on the loss of “control and possession” by the owner, is however cited with approval by Lord Esher in *Baumgott v. Gilchrist*, (1892) 1 Q. B. at p. 259; and by Lord Herschell, (1893) A. C. at p. 18. The old style of “granting to hire and to freight let” has dropped out of charters, and the modern form of charter, “It is mutually agreed between A., owner of the S., and C., that the S. shall proceed to X. and there load a cargo,” can rarely, if ever, be construed as a demise. Some American charters are made by deed, and run that the parties to the deed “covenant and agree in the freighting and chartering of the vessel,” and the charterer “covenants to charter and hire,” but the whole frame of the charter shows that no demise is intended. Some charters go so far that the owner only contracts “to provide a screw steamer,” of a certain class and tonnage, for a certain voyage. If the charter does amount to a demise, the hirer will not be liable for damage to the ship through the act of God without his negligence. *Smith v. Drummond* (1883), 1 C. & E. 160.

(m) *Per Lord Bramwell in Sewell v. Burdick* (1884), 10 App. C. 105. When indorsed, it is the only evidence; *vide post*, pp. 56, 62.

owner is usually merely a receipt (*n*); from the mate's receipt (*o*), shipping-cards (*p*), placards, or handbills (*q*) announcing the sailing of the ship, advice-notes, or freight-notes (*r*); or from undertakings or warranties by the broker, or other agent of the carrier (*s*).

Note 1.—There is no definition of “bill of lading” either in the Bills of Lading Act, 1855, or in any other of the various Acts of Parliament in which the phrase is used. The older form of a bill of lading always began, “Shipped on board the —.” But for many years, especially by the big lines, a form beginning “Received for shipment on board the —” has been employed. Considerable discussion as to the desirability of the latter form, especially from the point of view of bankers making advances on shipping documents, has taken place in recent times. In *The Marlborough Hill* (*t*) it was held by the Privy Council that a document in this form was a “bill of lading” within the meaning of that phrase in § 6 of the Admiralty Court Act, 1861 (*u*), and we think there can be little doubt that a similar decision would be given under the Bills of Lading Act, 1855 (*x*).

Note 2.—Shippers are usually well aware of the terms on which goods are shipped in any regular line or trade, as the bills of lading are printed and sold by firms of stationers, the particulars of the goods being filled in by the shippers themselves, who then leave them for signature at the office of the broker of the line. The judgment of Mellish, L.J., in *Parker v. South Eastern Railway Co.* (*y*),^c in its assump-

(*n*) *Vide post*, Articles 18, 19; and see *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67.

(*o*) *De Clermont v. General Steam Nav. Co.* (1891), 7 Times L. R. 187.

(*p*) *Peel v. Price* (1815), 4 Camp. 243.

(*q*) *Phillips v. Edwards* (1858), 3 H. & N. 813.

(*r*) See *Lipton v. Jescott Steamers* (1895), 1 Com. Cases, 32; where the terms of a bill of lading were made part of the contract by references to it on advice-notes and freight-notes.

(*s*) *Runquist v. Ditchell* (1800), 3 Esp. 64.

(*t*) (1921) 1 A. C. 444.

(*u*) Now repealed by the Administration of Justice Act, 1920.

(*x*) But see judgment of McCardie, J., in *Diamond Co. v. Bourgeois* (1921), 3 K. B. 443. The C. A. has held that on a contract for sale of goods c.i.f., where a bill of lading in the form “Received for shipment” is the only one issued by a well-known line, such a document is a good tender under the contract of sale; *Weis v. Produce Brokers Co.* (1921), 87 L. J. K. B. 472.

(*y*) (1877), 2 C. P. D. 422.

tion that a person taking a bill of lading must necessarily be bound by all its terms, for he knows that the contract of carriage is contained in it, seems a little too sweeping in view of the actual course of business. Modern bills of lading contain "a long list of excepted perils, exemptions from and qualifications of liability, printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight."

A question may therefore arise whether the bill of lading really represents the terms of the contract to which the shipper agreed, as where it contains in small print very unusual clauses. Thus, in *Crooks v. Allan* (z), Lush, J., in delivering judgment, said: "If a shipowner wishes to introduce into his bill of lading so novel a clause, as one exempting him from general average contribution . . . he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such part of the document that a person of ordinary capacity and care could not fail to see it. A bill of lading is not the contract, but only evidence of the contract, and it does not follow that a person who accepts the bill of lading which the shipowner hands him, is necessarily and without regard to circumstances bound to abide by all its stipulations."

So in *Lewis v. M'Kee* (a) the captain was held not affected by a restrictive endorsement on a bill of lading, to which his attention was not called, and, *semble*, which he could not ordinarily and reasonably be expected to see.

But when a shipowner has for years used a bill of lading in a certain form a shipper who agrees to accept it will be bound by its terms, especially if he has himself shipped goods under it before (b).

The same principle governs the effect of the restrictive stamps sometimes affixed in London to bills of lading for parts of a journey, for which one through bill of lading has already been signed (c). The question is similar to that raised in the "cloakroom cases," which are fully discussed in *Watkins v. Rymill* (d). There would be two questions of

(z) (1879), 5 Q. B. D. 38, at p. 40; and see *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67. See also the remarks of Hamilton, J., in *Whinney v. Moss S.S. Co.* (1910), 15 Com. Cas. 114 at pp. 122, 123.

(a) (1868), L. R. 4 Ex. 58.

(b) *Armour v. Walford* (1921), 27 Com. Cas. 37.

(c) *Vide post*, Article 22.

(d) (1883), 10 Q. B. D. 178. See, as to passenger tickets *Acton v. Castle Mail Co.* (1895), 1 Com. Cases, 135, and *Marriott v. Yeoward*, (1909) 2 K. B. 987.

fact for the jury: (1) Was the shipper actually aware of the particular clause or stamp? (2) If not, were reasonable means taken to inform him of it, and would a reasonable man have been aware of it? While a shipper who has shipped under a particular form of bill of lading for some time without objection would be treated as bound by its terms, it would certainly be advisable for a shipowner to give him notice of any change in that form (e).

In *Richardson v. Rowntree* (f) the House of Lords approved questions left to the jury as follows: (1) Did the plaintiff know that there was writing or printing on the ticket? (2) Did she know that such writing or printing contained conditions relating to the terms of the contract of carriage? (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?

Article 4.—Effect of Illegality on a Contract of Affreightment.

Where the contract of affreightment cannot be performed without a violation of English law, as it stands at the date the contract is made (g), it is void, whether the parties knew of the illegality or not when it was entered into (h).

As to the effect of war between Great Britain and a foreign power upon contracts between British and enemy subjects, see Note at the end of this Article.

If performance is made impossible by a change in the English law the contract is discharged (i).

(e) For a case arising from changes in the usual form of bill of lading, see *De Clermont v. General Steam Nav. Co.* (1891), 7 Times L. R. 187.

(f) (1894), A. C. 217. Cf. *Cooke v. Wilson*, (1916) 85 L. J. K. B. 888; *Hood v. Anchor Line*, (1918) A. C. 837.

(g) If it becomes illegal by a subsequent change of the law, the contract is not void but its obligations are discharged by impossibility of performance. See Note to Article 30, *infra*.

(h) *Esposito v. Bowden* (1857), 7 E. & B. 763; see also *Barker v. Hodgson* (1814), 3 M. & S. 267, 270; *Atkinson v. Ritchie* (1809), 10 East, 530, at p. 535. Cf. also *Mahmoud v. Ispahani* (1921), 2 K. B. 716.

(i) *Baily v. de Crespigny* (1869), L. R. 4 Q. B. 180. See Note to Article 30, p. 112, *infra*.

An English contract to perform an act in a foreign country is invalid in so far as the performance is unlawful by the law of the country in question (*k*).

Where a contract can be performed in two ways, one of which is legal and the other illegal, it will not be avoided (*l*) unless there is an intention to perform it in the way known to be illegal (*m*).

Case 1.—An Italian ship was chartered by an Englishman to carry wheat from Russia to England; before the ship arrived at the Russian port war was declared between England and Russia, and so continued up to the day when the lay-days for loading would have expired. *Held*, that the declaration of war made commercial intercourse between England and Russia illegal, and that the contract was therefore dissolved by English law (*n*).

Case 2. C. chartered in France A.'s ship to load pressed hay in France and proceed direct to London, "all cargo to be brought and taken from ship alongside." C.'s agent told the captain that the hay was to be landed at a particular wharf in London, and the captain assented. At the time of making the charter, the import of French hay into England was illegal by English law, though neither party knew of it. On arrival at London, when landing at the proposed wharf was found illegal, after eighteen days' delay beyond the lay-days, C. unloaded the hay "alongside ship" for export in another vessel; this proceeding was not illegal. To an action by A. for demurrage, C. pleaded that the contract was void for illegality. *Held*, that the contract could be, and had been, performed legally, by taking the hay

(*k*) *Ralli v. Compania Naveira*, (1920) 2 K. B. 287. This agrees with the decisions in *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 544, and *Cunningham v. Dunn* (1878), 3 C. P. D. 443; but they might also, in modern times, be treated as examples of an undertaking to load or discharge in a reasonable time; the charterer's undertaking in such a contract is merely to do his best to overcome obstacles (*cf.* Article 132, *infra*), the difficulty created by the foreign law is merely an obstacle, and its cause immaterial. Older cases like *Blight v. Page* (1801), 3 B. & P. 295, *Barker v. Hodgson* (1814), 3 M. & S. 267, and *Sjoerds v. Luscombe* (1812), 16 East, 201, which are in conflict with the text above, must now be regarded as examples of the old and rigid rule of *Paradine v. Jane* (1647), Aleyn 26 (see Note to Article 30, *infra*), and treated as obsolete.

(*l*) *Waugh v. Morris* (1873), L. R. 8 Q. B. 202; *The Teutonia* (1872), L. R. 4. P. C. 171; *Haines v. Bush* (1814), 1 Marshall, 191.

(*m*) *Heslop v. Jones* (1877), 2 Chit. 550. See also *Cunard v. Hyde* (1858), 27 L. J. Q. B. 408; and *Wilson v. Rankin* (1865), L. R. 1 Q. B. 162, in which the plaintiff was held to have no illegal intention, and *Cunard v. Hyde* (1859), 29 L. J. Q. B. 6, in which he was held guilty.

(*n*) *Esposito v. Bowden*, *vide supra*. See also *Avery v. Bowden—Reid v. Hoskins* (1856), 6 E. & B. 953.

alongside for exportation, and, as there was no evidence of intention to perform it illegally with knowledge of its illegality, it was not void, and C. was liable for demurrage (o).

Case 3.—A Prussian ship was chartered to call at an English port for orders "to proceed to any safe port in Great Britain or on the continent between Havre and Hamburg." She received orders at Falmouth, on July 11, to proceed to Dunkirk; on July 19, before she had reached Dunkirk, war broke out between France and Prussia. *Held*, that the contract was not dissolved, as the charterer could name some safe port within the charter limits, not being French, at which the charter could legally be performed (p).

Note.—Contracts with Enemies.

I. The test of enemy status, for the purpose of this matter, is not nationality but domicile. An enemy is one who resides or carries on business within the enemy territory (q).

II. Any contract entered into after the outbreak of war between a British subject and an enemy is absolutely void for illegality unless made with the clear permission or licence of the Crown (r).

III. As regards contracts entered into between a British subject and an enemy before the outbreak of war most of the

(o) *Waugh v. Morris* (1873), L. R. 8 Q. B. 202; see also *Cargo ex Argos* (1873), L. R. 5 P. C. 134, where illegality by French law, equivalent by English law to impossibility in fact, was met by the suggestion that the charterer might unload "alongside," and so act legally. (But see now *Ralli v. Compania Naviera* (1920), 2 K. B. 287). The avoidance must be limited strictly to the acts rendered illegal. Thus, in *Storer v. Gordon* (1814), 3 M. & S. 308, where a ship was chartered to deliver an outward cargo on payment of freight, and carry home cargo, the seizure of the outward cargo by the Government before delivery was held to absolve the charterer from payment of freight, but not from the liability to load a return cargo. Seizure by revenue officers will be *prima facie* proof of illegality of voyage, without proving actual condemnation. *Blanck v. Solly* (1818), 1 Moore, 531.

(p) *The Teutonia* (1872), L. R. 4 P. C. 171.

(q) *Porter v. Freudenberg*, (1915) 1 K. B. 857. *Cf. Scotland v. S. A. Territories, Ltd.*, (1917) 33 T. L. R. 255. The distinction, however, is not always carefully preserved. In *Porter v. Freudenberg*, in passages where an enemy's right to sue in our courts is discussed, "enemy" is used in the sense of nationality, not in that of domicile. It is laid down (and the rule is an old one) that an enemy may sue if he be within the realm by the licence of the King. If so, though he is "an enemy" by test of nationality, he may not, and in nearly all cases will not, be so by test of domicile. So in *Shaffenius v. Goldberg*, (1916) 1 K. B. 284, the plaintiff was not an "alien enemy" on the test of domicile, but solely on that of nationality.

(r) *The Hoop* (1799), 1 C. Rob. 196; *Willison v. Patteson* (1817), 7 Taunt. 439. Contrast *Shaffenius v. Goldberg* (*ubi supra*).

questions that arise have now been more or less settled. (i.) A cause of action that before the war has accrued upon such a contract to the enemy is not destroyed by the outbreak of war, but the enemy's right to sue in the British Courts is suspended until after the end of the war (s). In a case where the enemy was rather an artificial and not very hostile "enemy," the Courts treated this rule as a matter of defence open to the British subject, which he could waive, and thereby remove the enemy's disability (t). It can hardly be supposed that such complaisance by a British defendant in a suit by a resident in Germany would in the late war have had the same result. An exception to the rule arises in the case of an enemy within the realm by the licence of the King (u). (ii.) On a cause of action that on such a contract has accrued to a British subject he may sue the enemy during the war, provided he can serve him with a writ under the rules of practice (s). The enemy so sued may appear and defend, and may also appeal against any decision that is given against him (s). (iii.) The obligation of either party under such a contract to do anything during the war in performance of it ceases (x). (iv.) The chief difficulty, in regard to this topic, arises in regard to contracts, the terms of which, as to time of performance, would impose duties of performance after the war has ceased. All duty of performance during the war having disappeared under the last mentioned rule, to what extent does the duty of performance survive, or revive, after the war is ended? The question is commonly put in the form—"Is the contract dissolved or only suspended?" In this question "suspended" means "temporarily cancelled," and not "postponed." And the question really means—"Is the contract dissolved or not?" For the alternative, "or suspended," only means that performance is for the time impossible though the contractual obligation is not dissolved.

The answer to the question depends on the particular circumstances of each case. The contract may be dissolved upon one, or more, of three grounds:—(i) because cessation of performance during the war will involve so radical an

(s) *Porter v. Freudenberg* (*ubi supra*).

(t) *Janson v. Driefontein*, (1902) A. C. 484.

(u) *Porter v. Freudenberg* (*ubi supra*); *Shaffenius v. Goldberg* (*ubi supra*). This may be a real exception in some cases (e.g., where a plaintiff is carrying on business in an enemy country but is resident in the realm by licence), but in most cases, as is pointed out in footnote (g), *supra*, is only an apparent exception; on the test of domicile such a plaintiff is not an "enemy."

(x) *Esposito v. Bowden* (1857), 7 E. & B. 763.

alteration in the whole substratum of the contract that to perform it when performance again becomes possible will be to carry out a new and different contract (*y*); this is merely an illustration of the discharge of contract under the doctrine discussed on p. 112 in the Note to Article 30; (ii) because the continued existence of the contract will be contrary to the public policy of Great Britain as a belligerent (*z*); (iii) because the continued existence of the contract will be illegal as involving the British contracting party in trading with the enemy (*a*).

In fact the majority of contracts between a British subject and an alien who becomes an enemy will be dissolved by the outbreak of war. But this is not a necessary result in every case. If, for example, in January, 1914, a British Insurance Co., in consideration of £10,000 paid down, agreed to pay an annuity to a resident in Hamburg, though the annuity could not be paid during the war (nor the amount of the annuity accruing during the period of the war be paid after the war ended), yet the obligation to pay it during the twenty years of the annuitant's life after the war will survive.

Article 5.—Effects of Blockade.

A charter, the performance of which requires the running of a foreign blockade, is not illegal by the municipal law of England, though both parties knew of the blockade when the charter was entered into (*b*). The only effect of such knowledge will be to prevent the delay caused by the blockade from putting an end to the charter (*c*).

(*y*) *Distington Co. v. Possehl*, (1916) 1 K. B. 811.

(*z*) *Zinc Corporation v. Hirsch*, (1916) 1 K. B. 541; *Clapham S.S. Co. v. Naamlooze, &c. Vulcaan*, (1917) 2 K. B. 739; *Ertel, Bieber & Co. v. Rio Tinto Co.*, (1918) A. C. 260.

(*a*) *Naylor, Benzon & Co. v. Krainische Gesellschaft*, (1918) 1 K. B. 331.

(*b*) *The Helen* (1865), L. R. 1 A. & E. 1; *Medeiros v. Hill* (1832), 8 Bing. 231; *Moorsom v. Greaves* (1811), 2 Camp. 626; *Naylor v. Taylor* (1828), M. & M. 205.

(*c*) See Article 30, *post*; and see, as to contraband cargo, *Ex parte Chavasse* (1865), 11 Jur. N. S. 400. The effect of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), must also be considered. As to this, see *United States v. Pelly* (1899), 4 Com. Cas. 100.

Running a blockade, by international law, involves the confiscation of the ship if captured on the voyage out or home, and of the cargo, if its owners knew or might have known of the blockade when they entered into the contract of carriage (*d*).

Case.—To an action on a charter, defendants pleaded that "it was entered into for the purpose of running the blockade of the southern ports of the United States." *Held*, no answer in law (*e*).

Article 6.—Construction of the Contract.—On what Principle.

Charters and bills of lading are to be construed in the light of the nature and details of the adventure contemplated by the parties to them (*f*).

The construction to be given to charters and bills of lading is not an unnecessarily strict one, but such a one as with reference to the context and the object of the contract will best effectuate the obvious and expressed intent of the parties (*g*). They are to be construed according to their sense and meaning, as collected in the first place from the terms used, understood in their plain, ordinary and popular sense (*h*), unless they have generally, in respect of the subject-matter, as by the

(*d*) *The Mercurius* (1798), 1 Rob. 80; *The Alexander* (1801), 4 Rob. 93; *The Adonis* (1804), 5 Rob. 256, 259; *The Exchange* (1808), 1 Edw. 39, 42; *The James Cook* (1810), 1 Edw. 261; *Baltazzi v. Ryder* (1858), 12 Moore, P. C. 168. The headnote to the last case is not justified by the report, so far as it contradicts the text.

(*e*) *The Helen* (1865), L. R. 1 A. & E. 1.

(*f*) *Mackill v. Wright* (1868), 14 App. C., per Lord Halsbury, at p. 114; Lord Watson, at p. 116; Lord Macnaghten, at p. 120. *Glynn v. Margetson*, (1893) A. C. 351.

(*g*) *Dimech v. Corlett* (1858), 12 Moore, P. C. at p. 224; so, per Brett, M.R., in *Sailing Ship Garston v. Hickie* (1885), 15 Q. B. D. 580. "The term 'port' is to be taken in its business, popular, or commercial sense, and not in its legal definition for revenue or pilotage purposes"; and see the same judge's remarks in *Stewart v. Merchants' Marine Ins. Co.* (1885), 16 Q. B. D. at p. 627. See also *Hall v. Paul* (1914), 19 Com. Cas. 384.

(*h*) These words are cited with apparent approval by Bray, J., *Mendl v. Ropner*, (1913) 1 K. B. at pp. 31, 32.

known usage of trade or the like, acquired a peculiar sense, distinct from their popular sense; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense (*i*).

The construction of a charter or bill of lading is for the Court, unless there is mutual (*k*) mistake of the parties, ambiguity (*l*), or some peculiar meaning attached to the words of the document by reason of the custom of the trade or port to which the document relates. In these cases the presence of the mistake, or the meaning of the words, will be a question for the jury, and oral evidence will be admissible to assist their decision (*m*); whether there is any ground for the admission of oral evidence on these points (*n*) will be a question for the Court (*o*).

Exceptions or clauses introduced in favour of one party to the contract are to be construed most strictly against him (*p*).

Where different parts of the instrument are contradictory to each other, or of ambiguous agreement, the whole of the document must be considered to arrive at the general meaning (*q*). Difference in the size of type, in

(i) *Per* Lord Eldon in *Robertson v. French* (1803), 4 East, at p. 135, cited by Bowen, L.J., in *Hart v. Standard Marine Ins. Co.* (1889), 22 Q. B. D. at p. 501.

(k) *Dixon v. Heriot* (1862), 2 F. & F. 760.

(l) *Cf. The Curfew*, (1891) P. 131.

(m) See *Aktieselskab Helios v. Ekman*, (1897) 2 Q. B. 83 (C. A.), where oral evidence was admitted to explain what was meant by "alongside," and "delivery" at a particular port. See also *Vergottis v. Ford* (1918), 34 T. L. R. 233, in which rectification of a charterparty, upon oral evidence of common mistake in its expression, was allowed.

(n) As to variation of charters or bills of lading by parol evidence, see *Thompson v. Brown* (1817), 7 Taunt. 656; *White v. Parkin* (1810), 12 East, 578; *Leduc v. Ward* (1888), 20 Q. B. D. at p. 480.

(o) *Bowes v. Shand* (1877), L. R. 2 App. C. 462; *Ashforth v. Redford* (1873), L. R. 9 C. P. 20. As to evidence of usage, see Article 8.

(p) *Burton v. English* (1883), 12 Q. B. D. at p. 220, *per* Brett, M.R., and at p. 222, *per* Bowen, L.J.; *cf. Norman v. Binnington* (1890), 25 Q. B. D. at p. 477. *The Waikato*, (1899) 1 Q. B. 56 (C. A.). But *cf. Mendl. v. Ropner*, (1913) 1 K. B. 27.

(q) *Cf. Elderslie v. Borthwick*, (1905) App. C. 93; *The Hibernian*, (1907) P. 277; *Nelson v. Nelson*, (1908) App. Cas. 16.

which different parts are printed, is not to be taken as a measure of the importance of the passages so printed (r).

Case 1.—A ship was chartered to proceed to X., a river port, and there load, “the master guaranteeing to carry 3000 tons dead weight of cargo, upon a draught of twenty-six feet of water.” The ship could carry such a cargo, at such a draught in salt, but not in fresh, water. *Held*, that as the charter shewed that both parties contemplated loading in a river, the guarantee must be applied to both fresh and salt water (s).

Case 2.—A ship was chartered to “proceed to loading-berth, North Dock, Swansea, and there load, always afloat, a full cargo . . . lighterage if any, necessary to enable steamer to complete loading at North Dock, Swansea, to be at merchant’s risk and expense.” The vessel could have loaded “always afloat” in the North Dock, but could not at neap tides have got over the sill fully loaded. To avoid waiting till spring-tides, the shipowners moved the ship to another dock when partly loaded; the charterers claimed the cost of carrying cargo to the other dock. *Held*, that the clause as to lighterage was sufficiently ambiguous to admit extrinsic evidence in the shape of telegrams between the parties before signing the charter to explain it (t).

Article 7.—Construction of the Contract.—By what Law.

The general rule of English law is that a contract is to be construed according to the law by which the parties intend to be bound (u). If that intention is not expressed in the contract, the Court must ascertain what is their implied intention (u). In the absence of other indications, in ordinary contracts, the implication will be that the parties intended to be bound by the *lex loci contractus* (u).

In regard to charterparties and bills of lading the general rule as to contracts applies; they will be

(r) *Elderslie v. Borthwick* (*ubi supra*).

(s) *The Norway* (1865), 3 Moore, P. C. N. S. 245. *Cf. Hart v. Standard Marine Co.* (1889), 22 Q. B. D. 499; *Mackill v. Wright* (1888), 14 App. C. 106.

(t) *The Curfew*, (1891) P. 131. See *The Nifa*, (1892) P. 411, when such evidence was rejected, there being no ambiguity.

(u) All the cases are exhaustively discussed in *British S. A. Co. v. De Beers*, (1910) 1 Ch. 354. See also *per* Lord Herschell in *Hamlyn v. Talisker Distillery*, (1894) A. C. at p. 207.

governed by the law by which the parties intend to be bound, and if that is not expressed it must be ascertained as a matter of implication (*x*). But in the absence of other indications (*y*), as regards charterparties and bills of lading, the primary implication will be that the parties intended to be bound by the law of the ship's flag (*z*), and not, as in other contracts, by the *lex loci contractus*.

Whoever puts his goods on board a foreign ship (*a*) to be carried authorises the master to deal with them according to the law of the ship's flag (*b*), unless that authority is limited by express stipulation between the parties at the time of the agreement (*c*), and this may be so in cases of necessity, not provided for by the contract, though the intention of the parties is found to be that the contract should be governed by another law than that of the ship's flag (*d*).

In an English Court a question as to the rules of any foreign law is a question of fact, but is one that must be decided by the judge alone and not by a jury (*e*).

Case 1.—C., a British subject, chartered a French ship at a Danish port for a voyage from Hayti to France or England at charterer's option. The master in a Portuguese port gave a

(*x*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Chartered Bank v. Netherlands Co.* (1883), 10 Q. B. D. 521.

(*y*) *The Industrie*, (1894) P. 58, and *Chartered Bank v. Netherlands Co.* (1883), 10 Q. B. D. 521, are examples of cases in which the implication drawn was derived from such other indications. Cf. also *P. & O. Co. v. Sland*, (1865) 3 Moore, P. C. N. S. 272; and *Aktieselskab August Freuchen v. Steen Hansen*, (1919) 1 Ll. L. Rep. 393.

(*z*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The Gaetano e Maria* (1882), 7 P. D. 1, 137; *The Express* (1872), L. R. 3 A. & E. 597; *The August*, (1891) P. 329; *The Bahia* (1864), B. & L. 292.

(*a*) By a series of Acts beginning with 5 Rich. II. Stat. (i) Cap. 3, English merchants were forbidden to ship goods save on English ships. The principal Navigation Act was 12 Chas. II. cap. 18. The system was finally abandoned in 1845 by 8 & 9 Vict. cap. 84. It is curious to read the eulogy of its economic advantages by Lord Stowell in *The Eleanor* (1809), Edw. at pp. 147, 157.

(*b*) The materiality of this in case of the sale of a chartered ship involving the change of her nationality is considered in *Isaacs v. McAllum* (1921), 3 K. B. 377.

(*c*) *The Gaetano e Maria* (1882), 7 P. D., per Brett, L.J., at pp. 147, 148; per Cotton, L.J., at p. 149; *The Karnak* (1869), L. R. 2 P. C. 505.

(*d*) *The Industrie*, (1894) P. 58 (C. A.).

(*e*) Administration of Justice Act, 1920, sect. 15.

bottomry bond, binding ship, freight and cargo. C. as cargo-owner, having to pay under the bond, called upon the shipowner to indemnify him. The shipowner abandoned the ship and freight to him. This was a good defence at French, but not at English law. *Held*, that the French law, being the law of the ship's flag, governed the relations of the parties to the charter (f).

Case 2.—C., domiciled in England, shipped goods under a charter made in London on an Italian ship bound for England. The master in a Portuguese port gave a bottomry bond on ship, cargo, and freight. He did not communicate with his owners, but could have done so. By English law communication under such circumstances was necessary; by Italian law it was unnecessary. *Held*, that the powers of the master to deal with the goods were governed by Italian law, being the law of the ship's flag (g).

Case 3.—A German ship, with German master, was chartered by German charterers from Russia to England. Charterparty and bill of lading were in English. *Held*, the German law must govern the interpretation of the documents (h).

Case 4.—A charter was made in England, in the English form, of a German ship, containing the clause, "freight payable . . . per ton delivered." At a port of refuge the master sold damaged cargo. By German law full freight would be payable in such a case; by English law it would not. *Held*, by C. A. (reversing Barnes, J.) that it was the intention of the parties to make an English contract, and therefore no freight was payable (i).

Case 5.—A passenger with luggage embarked on an English vessel on a voyage from England for France under a ticket bought in England. The luggage was lost; the ticket under English law freed the ship from liability; the French law would render the ship liable in spite of the ticket. *Held*, that the English law must prevail, being both the law of the flag, and the *lex loci contractus*, and being also necessary to give some meaning to conditions in the ticket which would be invalid by French law (k).

Case 6.—An English company chartered an English ship to C., a citizen of the United States, to carry cattle from Boston to

(f) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115.

(g) *The Gaetano e Maria* (1882), 7 P. D. 1, 137.

(h) *The Express* (1872), L. R. 3 A. & E. 597; *The August*, (1891) P 329, but see Case 4.

(i) *The Industrie*, (1894) P. 58 (C. A.).

(k) *P. & O. Company v. Shand* (1865), 3 Moore, P. C. N. S. 272. See also *Moore v. Harris* (1876), L. R. 1 App. C. 318, where also the law of the flag and the *lex loci contractus* were the same. It is not possible to lay down any fixed rule as to the *lex loci contractus* from these two cases; particularly as in *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 145, Willes, J., took the case of bills of lading in foreign ports, such as Alexandria, as shewing the absurdity of the *lex loci contractus* as a general rule. In *The Stettin* (1889), 14 P. D. 142, the law of the flag, the law of the place of performance, and the law of the place where the contract was made, were shewn to be identical; and it therefore became unnecessary to decide between them.

England. The charter was made in Boston, and contained a clause protecting the shipowner from liability for the negligence of his master or crew. Such a provision was void by the law of Massachusetts as contrary to public policy, but valid by English law. The cattle were lost by the negligence of the master and crew. C. claimed against the company, who pleaded that they were not liable. *Held*, by Chitty, J., that the contract must be governed by English law; generally, as the law of the flag; and in particular as the law the parties showed their intention to be bound by. The Court of Appeal affirmed his decision on the second ground (l).

Case 7.—E., an English merchant, shipped goods in an English port to be carried to a Dutch port in a ship registered in Holland, and carrying the Dutch flag, belonging to a company registered in Holland, and also registered in England as an English joint stock company. The bill of lading was in the English language and form, and described the company as a "limited company." *Held*, that the intention of the parties was that the contract should be governed by English law, thus setting aside the *prima facie* application of the law of the flag (m).

Note.—The general rule of law is undoubted, that while the intention of the parties to a contract is the real guide in determining by what law they intended their contract to be governed, yet, in the absence of any evidence of a different intention, the law of the country where the contract was made is presumed to be the governing law. The cases preceding *In re Missouri S.S. Co.* (n) suggest that in the case of contracts of affreightment there is a strong presumption in favour of the law of the ship's flag; and this view was taken by Chitty, J., in the *Missouri* case, where at p. 327, after citing *Lloyd v. Guibert* (o), he said that the principle upon which that case proceeded (the law of the flag) "is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction, and the rights incidental to and arising out of the contract of affreightment, but to questions as to the validity of the stipulations in the contract itself. . . . It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, that of the flag; and so to hold is to adopt a simple natural and consistent rule." The conclusions of his judgment rest "first on the general ground

(l) *In re Missouri S.S. Co.* (1889), 42 Ch. D. 321.

(m) *Chartered Bank v. Netherlands India Steam Company* (1888), 10 Q. B. D. 521.

(n) *In re Missouri S.S. Co.* (1889), 42 Ch. D. 321.

(o) (1865), L. R. 1 Q. B. 115, 125.

that the contracts are governed by the law of the flag; and secondly on the particular ground that the parties were contracting with a view to the law of England.' The Court of Appeal, stating the general principle of the *lex loci contractus*, find that the parties contemplated that their contract should be governed by English law (which was also the law of the flag), but say nothing either for or against the law of the flag as a general presumption.

In the later case of *The Industrie* (p), however, the Court of Appeal has laid down a distinction between the powers of the master in a port of distress, in matters not provided for by the contract, where the law of the ship's flag, the only law the master may be expected to know, is taken as a guiding rule, as in the case of *The Gaetano e Maria* (q), and cases where it appears to be the intention of the parties that their contract shall be construed by a particular law, and so construed it deals with the matter in dispute, as in *The Industrie* (p). So far, therefore, as the powers of the master as agent of necessity are concerned, it is submitted that the previous authority of *Lloyd v. Guibert* (r) and *The Gaetano e Maria* (q), followed in *The August* (s), on these points is not shaken, and in view of these cases the cases of *The Hamburg*, *Duranty v. Hart* (t), *The San Roman* (u), and *The Wilhelm Schmidt* (x), so far as they set up another standard of construction than the law of the flag, are of very doubtful authority.

Article 8.—Evidence of Custom or Usage, when admissible.

A charter is so far conclusive as to the terms of the contract expressed in it, that what is not in the charter cannot be part of the terms (y).

(p) (1894), P. 58.

(q) (1882), 7 P. D. 137.

(r) (1865), L. R. 1 Q. B. 115, 125.

(s) (1891) P. 329.

(t) (1864), B. & L. 253, 260, 272.

(u) (1872), L. R. 3 Adm. 533; L. R. 5 P. C. 301.

(x) (1871), 25 L. T. 34; 1 Asp. Mar. C. 82.

(y) The truth of an oral representation not embodied in the charter may, however, be a condition precedent to the validity of the charter, or a collateral warranty, the breach of which gives rise to an action for damages. See *De Lassalle v. Guildford*, (1901) 2 K. B. 215 (C. A.),

To this there is an exception that customs of trade which regulate the performance of the contract, but do not change its essential character, are tacitly incorporated in the contract, though not expressed in it (*z*), on the ground that the parties to the contract must be presumed to have contracted with reference to such customs (*a*).

Customs of trade may control the mode of performance of a contract, but cannot change its intrinsic character (*b*). Thus if the express terms of the charter are inconsistent with the alleged usage, evidence of the usage will not be admissible (*z*).

Evidence of usage is therefore admissible to explain ambiguous (*c*) mercantile expressions in a charter, or to

and the cases cited therein for the general principle, and *Hassan v. Runciman* (1904), 10 Com. Cas. 19, for its application to a charterparty. But see *Heilbut v. Buckleton*, (1913), A. C. 30, as to the soundness of certain dicta in *De Lassalle v. Guildford*.

(*z*) *Robinson v. Mollett* (1875), L. R. 7 H. L. 802, at pp. 811, 819, 836. *Les Affreteurs Reunis v. Walford* (1919), A. C. 801. *Palgrave v. Turid* (1922), 1 A. C. 397. The custom may be excluded by express words, *Brenda Co. v. Green*, (1900) 1 Q. B. 518, "any custom of the port to the contrary notwithstanding." On the nature of a "custom of trade," see *per Willes, J.*, in *Meyer v. Dresser* (1864), 16 C. B. N. S. at p. 662.

(*a*) *Kirchner v. Venus* (1859) 12 Moore, P. C. 361, 399.

(*b*) *Mollett v. Robinson* (1870), L. R. 5 C. P. 656, *per Willes, J.*; see also L. R. 7 H. L. at p. 836; *The Nifa*, (1892) P. 411.

(*c*) *E.g.* "freight," which is a well-understood term in a contract, cannot be explained by usage: *Krall v. Burnett* (1877), 25 W. R. 305; though its method of payment, which varies in each port, can: *Brown v. Byrne* (1854), 3 E. & B. 702; *Falkner v. Earle* (1863), 3 B. & S. 360; *The Norway* (1865), 3 Moore, P. C. N. S. 245. In *Aktieselskab Helios v. Ekman*, (1897) 2 Q. B. 83 (C. A.), evidence of custom was admitted to explain the meaning of the words "alongside" and "delivery" in the port of London. See also *Glasgow Navigation Co. v. Howard* (1910), 15 Com. Cas. 88 (London); *Northmoor S.S. Co. v. Harland & Wolff* (1903), 2 Ir. Rep. 657 (Belfast). *Stephens v. Wintringham* (1898), 3 Com. Cas. 169 (Grimsby), is overruled by *Palgrave v. Turid* (1922), 1 A. C. 397 (Yarmouth). A custom at Leith as to American grain cargoes was held by the H.L. not to have been proved: *Strathlorne S.S. Co. v. Baird* (1916), Sess. Cas. H. L. 134. Similarly evidence was admitted to explain the phrase "in regular turn"; *The Cordelia*, (1909) P. 27. In *Bennetts v. Brown*, (1908) 1 K. B. 490. Walton, J., held that "weather working day" was an unambiguous term and refused to admit evidence to explain its meaning: but in *British & Mexican Co. v. Lockett*, (1911) 1 K. B. 264, the C. A. held that evidence of custom was admissible to explain "working day," and this seems to overrule *Bennetts v. Brown*.

add incidents, or to annex usual terms and conditions which are not inconsistent with the written contract between the parties, but not for any further purpose (*d*).

It is more readily admissible to explain the contract of which a bill of lading is evidence, as the bill of lading is not the contract, but only evidence of the contract (*e*).

In general, therefore, the term "loading" will be construed by the usages of the port of loading (*f*), "discharge" by the usages of the port of discharge (*g*), the method of payment of freight, in the absence of express provisions (*h*), by the usages of the port where freight is payable (*i*); for where the performance of a contract has reference to a particular trade the party contracting is necessarily obliged to make himself acquainted by due inquiry with the usages of that trade (*k*).

Usages and customs to be enforced by the Courts must be—1. reasonable; 2. certain; 3. consistent with the contract; 4. universally acquiesced in; 5. not contrary to law (*l*).

A custom is a reasonable and universal rule of action in a locality, followed not because it is believed to be the general law of the land or because the parties following

(*d*) *Robinson v. Mollett* (1875), L. R. 7 H. L. pp. 802, 815, per Mellor, J.; *Produce Brokers Co. v. Olympia Oil Co.*, (1917) 1 K. B. 320.

(*e*) See *Andrew v. Moorhouse* (1814), 5 Taunton, 435.

(*f*) *E.g. The Skandinav* (1881), 51 L. J. Ad. 93; *Fullagren v. Walford* (1883), 1 C. & E. 198; *Cuthbert v. Cumming* (1855), 11 Ex. 405; *Leidemann v. Schultz* (1853), 14 C. B. 38; *Lawson v. Burness* (1862), 1 H. & C. 396.

(*g*) *Marzetti v. Smith* (1883), 49 L. T. 580; *Petrocchino v. Bott* (1874), L. R. 9 C. P. 355; *Aste v. Stumore* (1884), 1 C. & E. 319.

(*h*) *Gulf Line v. Laycock* (1901), 7 Com. Cas. 1.

(*i*) See note (*c*), *supra*, p. 24; *post*, Note, p. 30.

(*k*) *Per Willes, J.*, in *Russian Co. v. De Silva* (1863), 13 C. B. N. S. 610, 617, and see cases and rules laid down in notes to *Wigglesworth v. Dallison*, 1 Smith, L. C. 12th ed., p. 613.

(*l*) For discussion of these conditions, see *Ropner v. Stoate Hosegood & Co.* (1905), 10 Com. Cas. 73; *Sea S.S. Co. v. Price Walker & Co.* (1903), 8 Com. Cas. 297, as to the growth and reasonableness of customs to discharge ships at a certain rate per day: *In re Walkers and Shaw*, (1904) 2 K. B. 152, where a custom was admitted; and *In re N. W. Rubber Co. and Huttenbach*, (1908) 2 K. B. 907; see at p. 917. See also *Hogarth v. Leith Seed Co.* (1909), Sess. Cas. 955; *Glasgow Navigation Co. v. Howard* (1910), 15 Com. C. 88.

it have made particular agreements to observe it, but because it is in effect the common law within that place to which it extends, although contrary to the general law of the realm (*m*).

An arbitrator empowered to decide disputes under a contract is competent to determine the existence of a custom affecting the rights and obligations under the contract (*n*).

Note.—In a charter to discharge “according to the custom of the port,” the jury were directed “that ‘custom’ in the charter did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port,” and the House of Lords approved this direction (*o*). This seems to require a less rigorous standard of proof than in the case of a legal custom. The nature of a binding custom has been thus illustrated: “In order that the shippers should be taken to have impliedly given leave to stow the goods on deck, the ship-owners must prove a practice so general and universal in the trade, and in the particular port from which the goods were taken, that every one shipping goods there must be taken to know that other people’s goods, if not his goods, might probably be stowed on deck” (*p*).

If a custom is once established, “contracting out” of it does not by itself destroy the custom. But if “contracting out” becomes so prevalent that the custom is only left operative in exceptional cases, then the custom itself must be held to have been abolished (*q*).

(*m*) *Per Scrutton, J., Anglo-Hellenic Co. v. Dreyfus* (1913), 108 L. T. 36, at p. 37, citing Tindal, C.J., in *Lockwood v. Wood* (1844), 6 Q. B. 50, at p. 64. Therefore an attempt to prove a custom in a Russian port supported only by evidence of the general law of Russia which differed from English law failed. *Anglo-Hellenic Co. v. Dreyfus* (*ubi supra*).

(*n*) *Produce Co. v. Olympia Co.*, (1916) 1 A. C. 314.

(*o*) *Postlethwaite v. Freeland* (1880), 5 App. C. at p. 616.

(*p*) *Newall v. Royal Exchange Shipping Co.* (1885), 33 W. R. 342, 868, at p. 869; on the facts of which see *Royal Exchange Co. v. Dixon* (1886), 12 App. C. at p. 18. The practice of the only shipper at the port for thirty years has been held not to constitute a custom of the port: *Clacevich v. Hutcheson* (1887), 15 Sc. Sess. C. 4th Ser. 11. Otherwise at the port of Newlyn: *Temple v. Runnalls* (1902), 18 T. L. R. 822. See also *Cazalet v. Morris* (1916), Sess. Cas. 952.

(*q*) *Per Channell, J., Ropner v. Stoate Hosegood* (1905), 10 Com. Cas. 73.

I. Cases in which evidence of usage has been held admissible.

Case 1.—Charter between A. and C., a foreigner, from Riga to Liverpool, containing clauses: "the steamer to be discharged in ten working days. Discharging dock to be ordered on arrival at Liverpool." Evidence was tendered of a custom of the port of Liverpool, that in the case of timber ships lay-days commenced on the mooring of the ship at the quay where she was to discharge. *Held admissible*, as explaining the meaning of "arrival at Liverpool"; inadmissible, if its effect was to vary or add to the terms of the charter, unless it was proved to have been known to both parties (r).

Case 2.—D. entered into a charter with A. "as agents for merchants," and signed it "as agents for merchants." Evidence was tendered of a custom that if D.'s principal were not disclosed within a reasonable time, D. was personally liable. *Held admissible*, as not inconsistent or irreconcilable with the written contract, but as adding in a certain contingency a collateral provision for liability (s).

Case 3.—A charter was made "on condition of the ship's taking a cargo of not less than 1000 tons of weight and measurement." *Held*, that the proportions of weight and measurement tonnage were to be ascertained by oral evidence of the usage of the port of loading (t).

Case 4.—A ship was chartered "to proceed to a port in the Bristol Channel or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same, eight running days to be allowed for discharging the cargo." The ship was ordered to Z., and entered the port of Z.: a custom of the port of Z. was proved that vessels too heavily laden to proceed in the port beyond Y., were lightened at Y., and proceeded by canal to Z., and there finished unloading; and that the times of unloading at Y. and Z. counted in the lay-days, but not the time spent in proceeding along the canal. *Held admissible*, as not inconsistent with the charter (u).

Case 5.—Wool was shipped from Odessa under a bill of lading, "freight to be paid in London on delivery at 80s. per ton, gross weight, tallow, grain, or seed in proportion as per London Baltic printed rates." *Held*, that evidence of the customs of the Russian trade was admissible to explain this bill of lading, though the

(r) *S.S. Norden v. Dempsey* (1876), 1 C. P. D. 654, and see Note, *post*, p. 30. But see *Metcalfe v. Thompson* (1902), 18 Times L. R. 706, where a customary rate of loading, if proved, was rejected as contradicting the provisions of the charter.

(s) *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482; see p. 37, *post*.

(t) *Pust v. Dowie* (1864), 5 B. & S. 20; see Article 25, *post*.

(u) *Nielsen v. Wait* (1885), 14 Q. B. D. 516; 16 Q. B. D. 67 (C. A.). But see *Reynolds v. Tomlinson*, (1896) 1 Q. B. 586. See also *Sea S.S. Co. v. Price Walker* (1903), 8 Com. Cases, 292.

defendant, the consignee under it, was wholly unconnected with the Russian trade (x).

Case 6.—A bill of lading stated that goods shipped at X. were deliverable at Z., “he or they paying freight for the said goods, five-eighths of a penny per pound—with 5 per cent. primage and average accustomed.” *Held*, that evidence of a custom of Z. to deduct three months’ discount on freight on goods from X. was admissible (y).

Case 7.—A charter provided that a ship should deliver a cargo of timber “which should be taken from alongside at merchant’s risk and expense.” *Held*, that evidence of a custom that the ship should place the timber in barges alongside at its own expense was admissible as explaining “alongside” and “delivery” (z).

Case 8.—By a charter cargo was to be discharged at a certain rate per “working day.” The charterer in answer to a claim for demurrage pleaded that by the custom of the port a “surf day” (i.e., a day when surf on the beach prevented lighters from discharging) was not a “working day.” *Held*, that evidence of the custom was admissible to explain the meaning of “working day” (a).

II. Cases in which evidence of usage has been held inadmissible.

Case 9.—A bill of lading contained the clause “freight payable in London.” Evidence was tendered that this meant by the custom of the steam shipping trade “freight payable in advance in London.” *Held inadmissible*, the word “freight” being unambiguous, and there being nothing in the context to qualify it (b).

(x) *Russian Steam Navigation Company v. De Silva* (1863), 13 C. B. N. S. 610.

(y) *Brown v. Byrne* (1854), 3 E. & B. 703. See also *Falkner v. Earle* (1863), 3 B. & S. 360; and *The Norway* (1865), 3 Moore, P. C. N. S. 246, and compare *Case 7, infra*.

(z) *Aktieselskab Helios v. Ekman*, (1897) 2 Q. B. 83; cf. *Petersen v. Freebody*, (1895) 2 Q. B. 294, where no custom was alleged. See and contrast *Case 16* below. The custom established in the first-named case is sometimes excluded by the insertion in the charter of the words “any custom of the port to the contrary notwithstanding.” *Brenda Co. v. Green*, (1900) 1 Q. B. 518. See as to a similar custom at Liverpool, *Cardiff S.S. Co. v. Jamieson* (1903), 19 Times L. R. 159; at London, *Glasgow Navigation Co. v. Howard* (1910), 26 T. L. R. 247; at Belfast, *Northmoor S.S. Co. v. Harland and Wolff* (1903), 2 Ir. Rep. 657.

(a) *British & Mexican Co. v. Lockett*, (1911) 1 K. B. 264. Contrast *Bennetts v. Brown*, (1908) 1 K. B. 490; which appears to be overruled by this decision of the C. A.

(b) *Krall v. Burnett* (1877), 25 W. R. 305. See also *Lewis v. Marshall* (1844), 7 M. & G. 729, where evidence that “freight” included “passage money” was rejected; *Cockburn v. Alexander* (1848), 6 C. B. 791; *Bennetts v. Brown*, (1908) 1 K. B. 490.

Case 10.—A charter “to a safe port, or as near thereto as she can safely get, and always lay and discharge afloat.” Evidence was tendered of a custom of the port of Z. to lighten ships outside the port, if they were laden too deep to enter the port, and then to require them to proceed into port. *Held inadmissible*, as inconsistent with the contract, and as being a custom “to apply to a contract where the ship was only bound to go into Z., something to be done before she got to Z.” (c).

Case 11.—A charter to deliver “at Z., or so near thereto as the vessel could safely get.” Evidence was tendered of a custom of the port of Z. by which the consignee was only bound to take delivery at Z. *Held inadmissible*, as inconsistent with the charter (d).

Case 12.—Evidence was tendered of a “universal custom” of merchants to deduct from the bill of lading freight the value of goods which, though mentioned in the bill of lading, have never actually been put on board. *Held inadmissible*, as a mere mode of carrying on business and of settling accounts, and not a practice of merchants creating rights between the parties to the contract (e).

Case 13.—In an action by the indorsee of mate's receipts given at X. against an English captain for delivering goods laden at X. to indorsee of a bill of lading, evidence was offered of a custom at X., that mate's receipts are negotiable instruments, passing the property in the goods by indorsement without notice to the shipowner, and that the master is bound only to sign bills of lading on delivery of the mate's receipts, or if he has already signed bills of lading, to sign a second set for the holder of the mate's receipt, to whom alone he must deliver the goods. *Held*, unreasonable and not binding on captains or shipowners (f).

Case 14.—A charter required the freighter to pay “95s. per ton on goods shipped at X. for Z., cotton to be taken at fifty cubic feet per ton.” Evidence was tendered of a custom at X., that the measurement before the goods were shipped should be accepted. *Held admissible*, but displaced by proof of the objection of the captain so to receive them, of their measurement on board by the

(c) *The Alhambra* (1881), L. R. 6 P. D. 68 (C. A.).

(d) *Hayton v. Irwin* (1879), 5 C. P. D. 130. Cf. *The Nija*, (1892) P 411. See also *Kearon v. Radford* (1895), 11 T. L. R. 226, where on a charter requiring the shipowner “to deliver into lighter,” evidence of a custom requiring the charterer to take out of the hold was rejected as contradicting the charter; and *Gulf Line v. Laycock* (1901), 7 Com. Cas. 1, where in a charter providing that freight was “to be paid on delivery in cash without deduction on gross weight at Queen's beam,” evidence of a custom that the consignee must either weigh at his own expense, or take without weighing at bill of lading weight less two per cent., was rejected as contradicting the charter. See also *Hogarth v. Leith Seed Co.* (1909), Sess. Cas. 955.

(e) *Per Willes, J.*, in *Meyer v. Dresser* (1864), 16 C. B. N. S. 646, 662.

(f) *Hathesing v. Laing* (1873), L. R. 17 Eq. 92.

captain, and his delivery to the shippers of a note of his measurement (g).

Case 15.—A time charterparty contained a provision that a commission of 3 per cent. on the estimated gross amount of hire was payable on signing the charter (ship lost or not lost) by the owners to certain brokers. Through the ship being requisitioned the charter was cancelled. To a claim by the charterers (as trustees for the brokers) for the commission, the owners pleaded that by custom commission was never payable to brokers except on hire earned and actually received. *Held*, that evidence of such custom was inadmissible as being inconsistent with the written contract (h).

Case 16.—A charter provided for a ship to carry timber to Yarmouth and to be discharged "always afloat . . . cargo to be taken from alongside at charterers risk and expense." From lack of water the vessel could not "lie afloat" nearer than 13 feet from the quay. Evidence of a custom that the shipowner must erect a staging across this gap, carry the timber across it, and dump it on the quay 10 feet from the edge was *held* inconsistent with the charterparty (i).

Note.—The line between admissibility and rejection of evidence of custom is very difficult to draw, and some of the cases, notably *Hutchinson v. Tatham* (k), are hard to reconcile with any clear principle. In one sense the contract must always be varied or added to by the admission of evidence of custom, inasmuch as the construction of the contract by the Court would not be the same without the parol evidence, or else such evidence would be unnecessary. The best test whether a custom is, or is not, consistent with the contract is that of Lord Campbell, C.J., "To fall within the exception of repugnancy the (custom) must be such as if expressed in the written contract would make it insensible or inconsistent" (l). The whole question was fully discussed in *Robinson v. Mollett* (m). Another difficulty arises from the apparent conflict between the *dicta* in *Kirchner v. Venus* (n) and *S.S. Norden v. Dempsey* (o), to

(g) *Bottomley v. Forbes* (1838), 5 Bing. N. C. 121. See also *Buckle v. Knoop* (1867), L. R. 2 Ex. 125.

(h) *Les Affreteurs Reunis v. Walford*, (1919) A. C. 801.

(i) *Palgrave v. Turid*, (1922) 1 A. C. 397, approving *Holman v. Wade* (*The Times*, May 11, 1877) and overruling *Stephens v. Wintringham* (1898), 3 Com. Cases, 169. Cf. *The Nifa*, (1892) P. 411.

(k) (1873), L. R. 8 C. P. 482; and p. 37, *infra*.

(l) *Humfrey v. Dale* (1857), 7 E. & B. 266, at p. 275. "I accept and agree with this test," Lord Birkenhead, L.C., *Palgrave v. Turid*, (1922), 1 A. C. at p. 406. (m) (1875), L. R. 7 H. L. 802.

(n) (1859), 12 Moore, P. C. 361, 399.

(o) (1876), 1 C. P. D. at p. 662. Cf. *Holman v. Peruvian Nitrate Co.* (1878), 5 Sc. Sess. C., 4th Series, at p. 663.

the effect that customs do not bind one ignorant of them, and such cases as *Robertson v. Jackson* (p) and *Hudson v. Ede* (q), where customs of a port were held to bind persons ignorant of them. The explanation seems to be that, in the latter class of cases, custom is introduced to explain the meaning a word bears in the charter; e.g. the parties are presumed to have meant by "loading," "loading as carried out at the port of loading," but what this is can only be construed by the customs of the port of loading. The fact that a person who has contracted to "load" at a certain port is ignorant of how "loading" is conducted at that port cannot save him from being bound by the ordinary method of loading there. On the other hand, when, as in the former class of cases, something is sought to be added to the charter beyond the language the parties have used, or the essential character of the contract is sought to be varied, it may fairly be required that both parties be shewn to have known of this addition, and therefore to have contracted with regard to it.

Article 9.—Printed Forms of Contract.

Questions of mistake in the expression of intention frequently arise in the case of charters effected by filling in printed forms, where parts of the printed form, left in by inadvertence, are in direct contradiction to clauses written in the form (r): in these cases the written clause should usually prevail, as clearly expressing the intention of the parties (s). It is unnecessary to find a mean-

(p) (1845), 2 C. B. 412.

(q) (1868), L. R. 3 Q. B. 412.

(r) Curious charters result from the filling in of time charters on printed forms intended for voyage charters, and *vice versa*.

(s) See *Love v. Rowtor Co.*, (1916) 2 A. C. 527; *Scrutton v. Childs* (1877), 36 L. T. 212; *Glynn v. Margetson*, (1893) A. C. 351; *Hadjipateras v. Weigall* (1918), 34 T. L. R. 360; *contra*, per Charles, J., in *Baumvoll v. Gilchrist*, (1891) 2 Q. B. at p. 317; citing *Alsager v. St. Katharine's Docks* (1845), 14 M. & W. 794, which hardly supports the learned judge's view. Where in the margin of a bill of lading, which contained in print a long list of exceptions, including negligence, the words "At Merchant's Risk" were added in writing, it was held that the written words were only intended to sum up the effect of the printed matter, and did not supersede it as the effective agreement: *Briscoe v. Powell* (1905), 22 Times L. R. 128.

ing in the particular charter for every word of a common printed form (*t*), and it may be necessary, in order to give effect to the written words, actually to disregard printed words that are inconsistent (*u*). The Court may probably look at deletions from the printed form as showing the intention of the parties (*x*).

Case 1.—A charter contained a printed clause that cargo at Z. “should be brought to and taken from alongside at owner’s risk and expense”; and a written one: “cargo at Z. as customary.” The custom at Z. is that the ship pays for the lighterage. *Held*, that of these contradictory clauses the written one should prevail as being obviously intended by the parties (*y*).

Case 2.—A charter contained a printed clause: “The cargo to be taken from alongside the ship at merchant’s risk and expense, where she can lie always afloat”; and a written clause: “The cargo to be discharged . . . according to the custom of the respective ports.” *Held*, that a custom of Yarmouth was not admissible to put on the shipowners the cost of pulling cargo from the ship “always afloat” to the quay (*z*).

Case 3.—A charter for outward voyage from X. only, on a printed form, had a printed memorandum in the margin: “commission to be paid to C., to whom the vessel is to be addressed on

(*t*) *Per* Brett, J., and other judges in *Gray v. Carr* (1871), L. R. 6 Q. B. 522, 536, 557; *Pearson v. Goschen* (1864), 17 C. B. N. S. 353, 373, 376; but see *McLean v. Fleming* (1871), L. R. 2 H. L. (Sc.) 128.

(*u*) See *Love v. Rowtor Co.*, (1916) 2 A. C. 527, at pp. 535, 536. *Cf. Cunard Co. v. Marten*, (1903) 2 K. B. 511.

(*x*) *Per* Lord Esher in *Baumvoll v. Gilchrest & Co.*, (1892) 1 Q. B. 256; *cf. per* Lord Herschell, (1893) A. C. p. 15. See also *Gray v. Carr* (1871), L. R. 6 Q. B. at p. 524 (note) and p. 529; *Stanton v. Richardson* (1874), L. R. 9 C. P. 390; *Glynn v. Margetson*, (1892) 1 Q. B. 337; (1893) A. C. at p. 357, *per* Lord Halsbury; *Caffin v. Aldridge*, (1895) 2 Q. B. 650; *Rowland S.S. Co. v. Wilson* (1897), 2 Com. Cases, 198; *contra, per* Lords Hatherley and Blackburn in *Inglis v. Buttery* (1878), L. R. 3 App. Cas. at pp. 569, 576; Farwell, L.J., in *Lyderhorn Co. v. Duncan*, (1909) 2 K. B. at p. 941; Eve, J., in *Manchester Co. v. Horlock*, (1914) 1 Ch. at pp. 463, 464. It is not clear why the “deletion” is not a “surrounding circumstance” which may be looked at.

(*y*) *Scrutton v. Childs* (1877), 36 L. T. 212. See also *Alsager v. St. Kath. Docks* (1845), 14 M. & W. at p. 799; *Moore v. Harris* (1876), 1 App. Cas. 318, 327; where the written clauses required the ship to deliver to a railway and forward to Toronto, and there was a printed clause “goods to be taken from alongside by consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at expense of consignee.”

(*z*) *The Nifa*, (1892) P. 411, in which A. L. Smith, J., doubted *Scrutton v. Childs* (v.s.); rather thinking that the clauses were not contradictory than objecting to the principle here stated.

her return to X." *Held*, that oral evidence was essential to show that the memorandum was part of the contract (a).

Case 4.—A printed charter between A. and C. contained a clause in print, "the ship being now warranted tight and strong." No evidence of inadvertence in both parties as to this clause was given, and Erle, C.J., cautioned the jury against getting rid of a clause by oral evidence of misunderstanding (b).

Article 10.—Alterations in Contract.

An alteration, addition, or erasure in a charter after signature, made and assented to by one party only, voids the charter (c); mutual assent may effect such alteration (d).

(a) *Hibbert v. Owen* (1859), 2 F. & F. 502; see *Mackill v. Wright* (1888), 14 App. C. at p. 117.

(b) *Dixon v. Heriot* (1862), 2 F. & F. 760.

(c) *Croockewit v. Fletcher* (1857), 1 H. & N. 893, 912.

(d) *Hall v. Brown* (1814), 2 Dow, H. L. 367.

SECTION II.

PARTIES TO THE CONTRACT.

Article 11.—Who are Principals.

EVIDENCE expressly to contradict a statement in the charter as to the parties to it will not be admitted (*a*), in the absence of mutual mistake (*b*), or parol agreement between the parties (*c*). But where the charterparty contains a statement leaving it ambiguous whether a particular person was intended to be personally liable under it, or where a person who did not execute the charter denies that he ever gave any authority for its execution, parol evidence of the real contract between the parties or whether there was any real contract will be admissible (*d*), and the undisclosed principal of a person described as “charterer” may give evidence to prove his position, and sue as such (*e*).

Case 1.—B. signed a charter as “owner of the good ship *Anne*”; evidence was tendered to prove that he signed as agent for A., the real owner. *Held*, inadmissible, to contradict the special description in the charterparty, or to allow A. to sue (*a*).

Case 2.—B., a broker, sold to C. goods and gave a sold note: “Sold by B. to C. for and on account of owner.” *Held*, that B. was not primarily liable on the contract, but that evidence of a custom in the trade that brokers were liable as principals on such a contract if they did not disclose their principal at the time of

(*a*) *Humble v. Hunter* (1848), 12 Q. B. 310. It is, however, a question of construction who are the parties, and though a man is described as “charterer” in the body of the document the form of his signature may be sufficient to show that he is only agent for the “charterer” and therefore not personally liable as a party. See *Ariadne Co. v. McKelvie*, (1922) 1 K. B. 518 and Article 13, *infra*.

(*b*) *Breslau v. Barwick* (1876), 36 L. T. 52.

(*c*) *Wake v. Harrop* (1862), 1 H. & C. 202; *Cowie v. Witt* (1874), 23 W. R. 76.

(*d*) See *supra*, Article 6.

(*e*) *Drughorn v. Rederi Akt. Transatlantic*, (1918) 1 K. B. 394; affirmed H. L., (1919) A. C. 203.

making the contract, was admissible, inasmuch as it did not remove the principal's liability, but added a personal liability of the broker. *Semble* (*per* Fry, L.J.), it would not have been admissible if it professed to exclude the liability of the principal (*f*).

Case 3.—In a printed charter between C. and A., the name of K., who was not a party to the charter, was by mistake left as charterer. To the plea that A. had not contracted with C., a reply that the intention was to make a contract between A. and C., but that K.'s name had been left in by mistake, was held good in law, without reforming the contract (*g*).

Case 4.—A charter with A., in the body of which D. and Co., were expressed to be charterers, was signed by D., "For C. and Co., D. and Co., agents." In an action by A. against D., D. set up an express parol agreement between A. and D. that D.'s signature was only to be as agent, and was not to render him liable as principal. *Held*, a good defence (*h*).

Case 5.—D. signed a charter with A. "for C., D. agent," and in an action against him by A., gave evidence that at the time of signing he told A. that he (D.) was not liable, but that C. was. A. admitted this, but said he remained silent, and did not assent. *Held*, evidence to go to the jury of express agreement that D. should not be liable, which would be a good defence (*i*).

Note.—This proposition is apparently contradicted by four cases (*k*). In *Schmaltz v. Avery* (*l*) C. had entered into a charter between "A. and C. & Co., agents of the freighter," and containing the clause, "this charter being concluded on behalf of another party, it is agreed that all responsibility on the part of C. & Co. shall cease as soon as the cargo is shipped." At the trial it was proved, no objection being taken to the evidence, that C. was the real freighter. The Court of Queen's Bench expressly noted that the evidence had not been objected to, and admitted that it, "strictly speaking, contradicted the charter, yet," they continued, "the defendant does not appear to be prejudiced; for, as he was regardless who the real freighter was, it should seem that he trusted for his freight to the lien on the cargo" (and not to the person of any particular freighter). "But there is no contradiction of the charter if the plaintiff can be considered as filling two characters, namely, those of agent

(*f*) *Pike v. Ongley* (1887), 18 Q. B. D. 708.

(*g*) *Breslauer v. Barwick* (1876), 26 L. T. 52.

(*h*) *Wake v. Harrop* (1862), 1 H. & C. 202.

(*i*) *Cowie v. Witt* (1874), 23 W. R. 76.

(*k*) *Jenkins v. Hutchinson* (1849), 13 Q. B. 744; *Schmaltz v. Avery* (1851), 16 Q. B. 655; *Carr v. Jackson* (1852), 7 Exch. 382; *Adams v. Hall* (1877), 37 L. T. 70.

(*l*) (1851), 16 Q. B. 655, 658, 663.

and principal . . . he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt the character of freighter himself if he chose.”

In *Carr v. Jackson* (m), where the charter was made between A. and D., but contained the clause, “this charter being concluded by D. on behalf of another party resident abroad,” D.’s liability is to cease on his shipping the cargo, Parke, B., said, “The defendant would have been responsible for the freight of the goods if it had been shown that he was the real principal in the matter; and the charter which professes to be entered into by him as agent would not preclude such evidence being given.”

In *Adams v. Hall* (n) B. entered into a charter as “B. for owners of the ship *S.*” and signed it “for owners, B.” In the Court below three letters written by B. were admitted without objection to prove that B. was the owner of the *S.*, and the Divisional Court, noting the absence of objection to the evidence, said that the signatures to the charter were consistent with B.’s ownership, and that the letters did not contradict, but removed ambiguity in, the charter, and could therefore be used to explain the position of B.

In *Jenkins v. Hutchinson* (o) B. entered into a charter “between A. and C.” and signed it “B pro A.” A. had given B. no authority to make the charter, and did not adopt it. The Court held that “a party who executes an instrument in the name of another, whose name he puts to the instrument and adds his own name as agent for that other, cannot be treated as a party to that instrument, and be sued upon it, *unless it be shewn that he was the real principal*” (which seems to imply that evidence for such a purpose was admissible).

In one only of these four cases, *Carr v. Jackson*, did the question of the admissibility of the evidence directly arise, and even there, as the evidence tendered was itself held insufficient, its admissibility or inadmissibility was not vital. In two of them (p) such evidence was admitted without objection in the Court below, and the higher Court had to deal with it as already admitted; and in the fourth case (q) the Court suggested that such evidence would have been

(m) (1852), 7 Exch. 382, 385; cf. *Pike v. Ongley* (1887), 18 Q. B. D. 708.

(n) (1877), 37 L. T. 70.

(o) (1849), 13 Q. B. 744, 752.

(p) *Schmaltz v. Avery*; *Adams v. Hall* (*vide supra*).

(q) *Jenkins v. Hutchinson* (1849), 13 Q. B. 744.

admissible in a state of facts not before them. Moreover, in three out of the four cases (r) the evidence was admitted to prove that an agent professing to contract for an undisclosed principal was himself that principal, and in *Jenkins v. Hutchinson* the Court suggested that the evidence might be admitted for that purpose; while in *Schmaltz v. Avery* the Court held that such a change of front, the agent declaring himself as the principal, who was before undisclosed, was not inconsistent with the ordinary terms of such charterparties.

Hutchinson v. Tatham (s) was also a case of an agent contracting for an undisclosed principal. The agent was held to be personally liable, on a custom imposing such a liability, if the agent did not disclose his principal within a reasonable time; but in so deciding, Bovill, C.J., said, "Apart from the evidence of custom, it is quite clear that upon a contract framed as this is (t), the defendants could not be personally liable. It appears on the face of the contract they are contracting on behalf of somebody else"; and Brett, J., said, "it is clear that without evidence of custom the defendants would not be liable as principals. So strong do I consider the terms of the contract in this respect, taking the terms in the body and the signature together, that were evidence offered to show that from the beginning the defendants were liable as principals, I should be prepared not to admit it" (u). This is clearly in direct conflict with the judgment of Parke, B., in *Carr v. Jackson*.

In *Pike v. Ongley* (x) Lord Esher withdrew his dicta in *Hutchinson v. Tatham*.

The result of the authorities as to the admissibility of evidence showing another principal to the contract than appears on its face is submitted to be:—

Where a man purports to contract as agent for an unnamed principal, evidence is admissible to show that the agent himself is that unnamed principal, such a double character of the agent not being inconsistent

(r) *Schmaltz v. Avery*; *Carr v. Jackson*; *Adams v. Hall* (*vide supra*).

(s) (1873), L. R. 8 C. P. 482.

(t) *I.e.* "as agents for merchants," both in the signature and the body of the charter.

(u) See also *per* Cockburn, C.J., in *Fleet v. Murton* (1872), L. R. 7 Q. B. 126; Hill, J., in *Deslandes v. Gregory* (1860), 2 E. & E. 602, 607.

(x) (1887), 18 Q. B. D. 708.

with the terms of the charter (*y*); or to prove a custom making the agent liable as principal, so long as such custom does not exclude the liability of the unnamed principal (*x*).

Article 12.—When an Agent binds his Principal.

A person professing to act as agent will bind his alleged principal by a charterparty if that principal has:—

- (1) given him express authority to make such a contract;
- (2) placed him in a position of implied authority, or held him out as having such authority (*z*);
- (3) afterwards ratified the contract purporting to be made on his behalf (*a*).

Case.—On a charter signed “C., *per proc.* of D.” it was proved that D. was allowed by C. to act as his general agent. *Held*, that C. was liable on the charter, though in making it D. had exceeded C.’s special instructions (*b*).

Article 13.—When Agent is personally liable as Principal.

Whether or not a person, professing to have signed the charter as agent, can sue and be sued as principal, depends, apart from custom or express agreement, on the

(*y*) *Schmaltz v. Avery* (1851), 16 Q. B. 655; *cf. Cooke v. Eshelby* (1887), 12 App. C. 271. *Schmaltz v. Avery* was followed and applied in *Harper v. Vigors*, (1909) 2 K. B. 556, and *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720, was distinguished. “In *Schmaltz v. Avery* (*ubi supra*, at p. 662), it is suggested that one who enters into a contract as agent cannot disclose himself as principal and recover if the other party relied on his character as agent and would not have contracted with him as principal. In *Harper v. Vigors* (*ubi supra*, at p. 563), Pickford, J., found that the facts raised this position, but the point was not taken and the agent recovered.

(*z*) On the doctrines of “holding out,” see *per Kay, L.J.*, in *Baum-voll v. Gilcrest*, (1892) 1 Q. B. at p. 263.

(*a*) *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Keighley Mated & Co. v. Durant*, (1901) A. C. 240.

(*b*) *Smith v. Maguire* (1858), 3 H. & N. 554.

intention of the parties, to be gathered from the terms and signature of the charterparty (c), and the conduct of the parties in connection with the contract (d).

By a custom of a trade an English agent for a foreign principal may be liable as principal to the exclusion of the liability of the foreign principal (e). But there is not in modern times, if there ever has been, any general presumption to this effect (f). And if by the terms of the contract the foreign principal is expressed to be directly liable as a contracting party any such custom will be inapplicable as being inconsistent with the contract (f).

Where a person signs the charter in his own name without qualification, he is, *prima facie*, deemed to contract personally, and, in order to prevent this liability from attaching, it must be clear from the other portions of the charterparty that he did not intend to bind himself as principal (g).

Note 1.—An agent wishing to protect himself from personal liability should state in the body of the charter that it is made by him as agent for the charterer or shipowner, and sign it "D., as agent for the charterer" (or shipowner). In this case he cannot be sued on the charter; unless he does not disclose his principal, and a custom that an agent so failing to disclose is personally liable is proved to exist in that trade or port (h). Where a person effects a charter as agent, so describing himself as to escape personal liability

(c) *Ariadne Co. v. McKelvie*, (1922) 1 K. B. 518. See *Note 2, infra*.

(d) A person may by his conduct have estopped himself from denying that he is personally liable: *Hermann v. Royal Exchange Shipping Co.* (1884), 1 C. & E. 413: where a well-known line put on to the berth an extra steamer, and were held by their conduct and the form of the bill of lading estopped from saying that they were not the parties contracting to carry.

(e) *Cf. Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598, 605.

(f) *Miller, Gibb & Co. v. Smith, Tyrer, Ltd.*, (1917) 2 K. B. 141; *Mercer v. Wright, Graham & Co.* (1917), 33 T. L. R. 343.

(g) *Brandt v. Morris*, (1917) 2 K. B. 785; *Hough v. Manzanos* (1879), 4 Ex. D. 104. *Cf. Gadd v. Houghton* (1876), 1 Ex. D. 357 (C. A.); *Hick v. Tweedy* (1890), 63 L. T. 765.

(h) *Per Bovill, C.J., and Brett, J., Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482. See also brokers' cases: *Fairlie v. Fenton* (1870), L. R. 5 Ex. 169; *Gadd v. Houghton* (1876), 1 Ex. D. 357 (C. A.); *Southwell v. Bowditch* (1876), 1 C. P. D. 100, 374 (C. A.); *Pike v. Ongley* (1887), 18 Q. B. D. 708.

on the charter, but has not in fact the authority he professes to have, so that his professed principal repudiates the charter, the alleged agent is liable for breach of an implied warranty that he has the authority that he professes to have (i). The measure of damages for such a breach is what the plaintiff has in fact lost, because he has not a binding contract with the alleged principal (k).

By telegraphic authority. In *Lilly v. Smales* (l), where an agent signing "by telegraphic authority of charterer, D., as agent," effected a charter which, through a mistake in transmission of the telegram instructing him, he had no authority to effect, Denman, J., admitted evidence as to the meaning attached by business men to such words, and held on that evidence that the warranty implied by such a signature was only that the agent had a telegram which, if correct, authorised such a charter as that which he signed.

In *Suart v. Haigh* (m), where S., a sub-agent, effected a charter purporting to be made between A. and "D. as agent for charterer C.," on telegraphic instructions from D., an agent of C., the charterer, and signed, "S. by telegraphic authority of D. as agent," the House of Lords held that S. warranted that he had authority from C., as well as from D., to sign the charter.

Note 2.—Whether a man has contracted as principal, or only as an agent, is a question that must be decided on the construction of the particular document as a whole (n). The description of the man in the body of the document and the form of his signature are the most material matters to be considered. It is difficult to deduce from the decided cases any general rules of construction, and it must be confessed that these cases are very conflicting. It is "in each case a question of construction having regard to the surrounding circumstances" (o).

(i) *Collen v. Wright* (1857), 8 E. & B. 647; see *Salvesen v. Rederi Nordstjernen*, (1905) A. C. 302, as to misrepresentation by the principal's own agent.

(k) *Ex p. Panmure* (1883), 24 Ch. D. 367; *Firbank v. Humphreys* (1886), 18 Q. B. D. 54.

(l) (1892), 1 Q. B. 456. For general principles when a person described as agent is a party to the contract, see *Brandt v. Morris*, (1917) 2 K. B. 785; *Ariadne Co. v. McKelvie*, (1922) 1 K. B. 518.

(m) (1893), 9 T. L. R. 488.

(n) *Ariadne Co. v. McKelvie* (1922), 1 K. B. 518.

(o) *Parker, J. Chapman v. Smith* (1907), 2 Ch. at p. 103.

I. Cases where an agent has been held liable as principal (*p*).

Case 1.—Charter between A. and "D. on behalf of C.," afterwards referred to as "the parties:" signed by A. and D. *Held*, D. was a party to the contract, and could sue and be sued under it (*q*).

Case 2.—Charter between C. and "B. for owners of the S." signed "for owners, B." *Held*, ambiguous, but when construed with letters (not objected to), to render B. personally liable (*r*).

Case 3.—Charter between A. and "D. agent for C.," signed "D." *Held*, D. was personally liable (*s*).

Case 4.—Charter between A. and "D., as agent for charterer . . . ship to load from agents of said freighters (=D.) . . . captain to sign bills of lading at any freight required by charterers (=D.) . . . This charter being entered into on behalf of others, it is agreed that all liability of charterers (=D.) shall cease on completion of the loading," signed "D." *Held*, D. was personally liable (*t*).

II. Cases where agent has been held *not* personally liable.

Case 5.—B. entered into a charter "between A. and C.," and signed it "B. pro A." A. had given B. no authority to make this contract and did not adopt it. *Held*, that B., who had executed the charter in the name of another, and added his own name only as agent for that other, could not be treated as a party to the charter and sued upon it; (*quære*, unless it could be shown he was the real principal (*u*)).

Case 6.—Charter between A. and "D., as agents to C., merchant and charterer." Signed "for C., D. as agent; for A., B. as agent." *Held*, that D. was not personally liable, upon a contract which both in its body and in its signature was expressed to be made by him "as agent" (*x*).

(*p*) See also *Oglesby v. Yglesias* (1858), E. B. & E. 930; *Schmaltz v. Avery* (1851), 16 Q. B. 655; *Paice v. Walker* (1870), L. R. 5 Ex. 173, which has been doubted by James, L.J., in *Gadd v. Houghton* (1876), 1 Ex. D. 357; *Weidner v. Hoggett* (1876), 1 C. P. D. 533.

(*q*) *Cooke v. Wilson* (1856), 1 C. B. N. S. 153.

(*r*) *Adams v. Hall* (1877), 37 L. T. 70.

(*s*) *Parker v. Winlow* (1857), 7 E. & B. 942. *Cf. Hick v. Tweedy* (1890), 63 L. T. 765.

(*t*) *Hough v. Manzanos* (1879), 4 Ex. D. 104.

(*u*) *Jenkins v. Hutchinson* (1849), 13 Q. B. 744. *Vide supra*, note to Article 11, p. 35. The remedy against B. was on a breach of warranty; *Collen v. Wright* (1857), 8 E. & B. 647. *Vide supra*, p. 40.

(*x*) *Deslandes v. Gregory* (1860), 2 E. & E. 602, but in *Hough v. Manzanos* (1879), 4 Ex. D. 104, Pollock, B., held that the words, "as agents for charterers," in the body of the agreement are ambiguous. See, however, *Hutchinson v. Tatham* (Case 8, *infra*).

Case 7.—Charter between “B., acting for owners of the ship,” and C.: “B. undertakes to pay demurrage on barges.” *Held*, by Bramwell, L.J., that B. was not personally liable (y).

Case 8.—Charter between A. and “D. as agents for merchants.” Signed “D., as agents for merchants.” *Held*, that, apart from custom, D. would not be personally liable (z).

Case 9.—Charter between “B. agents for the owners” and “D. charterers.” The charter contained various stipulations as to “the charterers” and their obligations. The charter was signed “For and on behalf of D. (as agent) J. A. M.” *Held*, that D. was not personally liable for demurrage (a).

Note.—An ingenious point has been taken with varying success, where an agent has been held personally liable on charters which also contain a cesser clause, *i.e.* “this charter being entered into on behalf of others, it is agreed that all liability of agents shall cease on shipping of the cargo,” or words to that effect. In *Oglesby v. Yglesias* (b) it was held by Erle and Crompton, J.J., that the agent, though personally liable on the charter, was freed by such a clause from all liability after shipping of cargo. On the other hand, in *Schmaltz v. Avery* (c), Patteson, J., delivering the judgment of the Court, said: “There is nothing in the argument that the plaintiff’s responsibility is expressly made to cease, ‘as soon as the cargo is shipped,’ for that limitation plainly applies only to his character as agent, and, being real principal, his responsibility would unquestionably continue after the cargo was shipped.”

Of these contradictory decisions that in *Oglesby v. Yglesias* (b) seems the more consistent with principle. If the plaintiffs relied on the defendant’s character as principal, then with their eyes open they have agreed to the insertion of a clause directly limiting his liabilities, and the erroneous recital that he acts for another will not affect the question. And this is not inconsistent with the case of *Gullischen v. Stewart* (d); for there, though persons exempted from

(y) *Wagstaff v. Anderson* (1880), 5 C. P. D. 171. Judgment proceeded partly on the ground that “shipbrokers do not usually act for themselves.”

(z) *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482; *Pike v. Ongley* (1887), 18 Q. B. D. 708.

(a) *Ariadne Co. v. McKelvie* (1922), 1 K. B., 518, following *Gadd v. Houghton* (1876), 1 Ex. D. 357 and overruling *Lennard v. Robinson* (1855), 5 E. & B. 125.

(b) (1858), E. B. & E. 930.

(c) (1851), 16 Q. B. 655, 663.

(d) (1884), 13 Q. B. D. 317.

liability after loading by a cesser clause were yet held liable for freight, it was on the subsequent contract in the bill of lading; on the charter alone they would, it is submitted, have been exempt. *Barwick v. Burnyeat* (e) even exempts them on charter and bill of lading together, but is, it is submitted, wrong.

Article 14.—Agent for Undisclosed or Unnamed Principal (f).

Evidence is admissible to show that a party contracting as “charterer” was acting as agent for an undisclosed principal, so as to entitle that principal to sue upon the contract (g).

Where an agent contracts for an unnamed principal evidence of a custom that the agent is personally liable, if he does not disclose his principal either at the time of the contract or within a reasonable time, is admissible to render the agent liable as principal, but not to exclude the principal’s liability.

Case.—D. entered into a charter with A. as “agents for merchants,” and signed it, “as agents for merchants.” Held, that evidence of a custom that if D. did not disclose to A. within a reasonable time the name of such merchants, D. was personally liable on the charter, was admissible (h).

(e) (1887), 36 L. T. 250. *Vide infra*, note (x), pp. 55, 56.

(f) On the liabilities of undisclosed principals and their agents, see *Thomson v. Davenport*, 2 Smith, L. C., 12th ed. p. 355, and notes thereto; *Higgins v. Senior* (1841), 8 M. & W. 834.

(g) *Drughorn v. Rederi Akt. Transatlantic*, (1919) A. C. 203, in which *Humble v. Hunter* (1848), 12 Q. B. 310, is distinguished. *Query*, whether *Rederiakt. Argonaut v. Hant*, (1918) 2 K. B. 247, was rightly decided. Lord Shaw in *Drughorn’s Case* thought not.

(h) *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482; *Pike v. Ongley* (1887), 18 Q. B. D. 708. On this custom see also *Dale v. Humfrey* (1853), E. B. & E. 1004; *Fleet v. Murton* (1871), L. R. 7 Q. B. 126; *Southwell v. Bowditch* (1876), 1 C. P. D. 100, 374.

Article 15.—Agent for Crown.

Agents chartering on behalf of the Crown, are not personally liable (*i*).

Article 16.—Classes of Agents.

Agents who may have authority on behalf of the ship-owners to effect charters, sign bills of lading, or do ship's business generally, are :

- (a.) The managing owner.
- (b.) Brokers.
- (c.) The captain.

(a.) Managing Owner.

The managing owner is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight (*k*).

He has authority to pledge his co-owners' credit for necessary repairs, when his owners cannot be communicated with in time (*l*), but not otherwise; nor can he, except under special circumstances, bind them by borrowing money (*m*). He cannot delegate his authority (*n*).

(*i*) *MacBeath v. Haldimand* (1786), 1 T. R. 172; *Unwin v. Wolseley* (1787), 1 T. R. 674; *Gidley v. Lord Palmerston* (1822), 3 B. & B. 275. In exceptional cases the agent may by the form of the charter expressly make himself liable, as in *Cunningham v. Collier* (1785), 4 Douglas, 233, where Lord Mansfield held such an agent liable.

(*k*) *Barker v. Highley* (1863), 15 C. B. N. S. 27, 34; *Thomas v. Lewis* (1878), 4 Ex. D. 18, 23. He used to be called "ship's husband." ["Vaughan gave a cash-note on his banker to Bicknell, a husband of a ship of his." *Grant v. Vaughan* (1764), 3 Burr. 1716.] The ship's husband now is usually only a servant of the shipowner who undertakes the special duty of looking after the ship's equipment and outfit. In the case of the limited companies (single ship companies), by which most steamship and sailing vessels are now owned, the articles of association provide for the appointment and powers of the "managing owner," and shareholders in them will be bound by the articles. By s. 59 of the Merchant Shipping Act, 1894, the name and address of the managing owner of every British ship, or of the ship's husband, or person to whom the management of the ship is entrusted by the owner, must be registered at the custom-house of the ship's port of registry. (See Appendix III.)

(*l*) *The Huntsman*, (1894) P. 214.

(*m*) *Pringle v. Dixon* (1896), 2 Com. Cases, 38; *Doeg v. Trist* (1897), 2 Com. Cases, 153; cf. *Steele v. Dixon* (1876), 3 Sc. Sess. Cases, 4th series, 1003.

(*n*) *Doeg v. Trist*, *vide supra*.

He binds by his action those of his co-owners, who have appointed him or expressly assented to his appointment, or hold him out as having authority, and no others (*o*).

The fact that any person is registered as "managing owner" is not conclusive that he has authority to bind his co-owners, but may be displaced by evidence of absence of authority (*p*).

In the absence of express instructions, he has the power to procure a charter, and make the contracts necessary to carry it out (*q*). He has no power, in the absence of such instructions, to vary or cancel a charter, still less to agree on behalf of his owners to pay money for such cancellation (*r*). He cannot against other part-owners assign the whole freight to secure moneys advanced to him (*s*).

(b.) *Broker.*

A broker's authority to effect, vary, or rescind (*t*) charters depends upon his special instructions at that particular time, and may be at any moment withdrawn. A broker is often held out as having authority to engage goods for the vessels of a particular shipowner, and to receive the freight for such goods, in which case his engagements will bind the shipowner, and payment of freight to him will discharge the person paying; but such authority may be rescinded at any time, unless the

(*o*) *Frazer v. Cuthbertson* (1880), 6 Q. B. D. 93; *Barker v. Highley* (1863), 15 C. B. N. S. 27. But his co-owners may bring an action of restraint. See *The England* (1886), 12 P. D. 32; and Article 17, sect. (*a*), *post*. As to the powers of a managing owner of several steamers, see *National Bank of Scotland v. Dewhurst* (1896), 1 Com. Cases, 318.

(*p*) *Frazer v. Cuthbertson*, *vide supra*.

(*q*) As to a managing owner's rights to commission on effecting charters, see *Williamson v. Hine*, (1891) 1 Ch. 390. He is bound to render accounts of the voyage within a reasonable time. *The Mount Vernon* (1891), 64 L. T. 148.

(*r*) *Thomas v. Lewis* (1878), 4 Ex. D. 18.

(*s*) *Guion v. Trask* (1860), 1 De G. F. & J. 373.

(*t*) Though agent to effect, he may not be agent to receive a revocation of an offer for, a charter. *Raeburn v. Burness* (1895), 1 Com. Cases, 22.

special manner or time of rescinding it has been provided for by the agreement between the shipowner and broker.

Note 1.—The management of a vessel includes:—

- I.—1. Decisions as to the employment of the ship.
2. Equipment and repairs of ship, and payment of accounts.
3. Engagement and discharge of crew.
4. Navigation, loading, and discharge of vessel.
- II.—1. Chartering the vessel, or engagement of freight for her.
2. Collection of freight.
3. Entry and clearance of ship, and Customs business.

The first class of work is considered owner's work; the second, broker's work. But the same person may unite the functions of managing owner and broker; some owners do all their broker's work in their own office, and the exact division of the work varies with each shipowner.

Brokers who are not owners usually make one of the following branches of work their special business:—

I.—*Brokers for the sale of ships (u).*

II.—*Chartering brokers*, who find charters for ships, or ships for employment. They usually keep the original signed charter, and issue certified copies for the use of the parties.

These two classes have no authority beyond their specific instructions in each particular case.

III.—*Loading brokers*, who habitually procure cargoes for vessels on the berth for a certain port or trade. Their connection with the merchants trading with such ports enables them to guarantee cargoes for vessels which they undertake to load, while to maintain that connection they must provide a fairly regular supply of vessels on that berth, by themselves chartering ships if necessary. They have power to make engagements to carry goods in the ship they load; they collect the freight on the engagements they have made, when such freight is payable at the port of loading; and they frequently supervise the stowage of the ship, though they do not accept responsibility to the shipowner for such stowage. They are paid as a rule by a percentage commis-

(u) It would appear from *Wilkinson v. Martin*, 8 C. & P. 1, that in 1837 brokers for the sale of ships in London resorted to the Royal Exchange to do business.

sion on the freight engaged. In certain trades, as the Australian, the chief loading brokers have formed a "ring," who in return for a merchant's promise to ship all his goods by the vessels loaded by the "ring" at an agreed rate, undertake to carry such goods at as low a rate as any vessel that may be put on the berth (x). All vessels on the berth which are not put in the hands of the "ring" to load, must be prepared to suffer severe competition. Some steam lines have especially appointed loading brokers, to whom application is made for room for goods to be shipped on any ship of the line, and to whom freight is paid. Their authority, however, is determinable by the shipowner, either on the terms of their appointment or at a moment's notice. On some lines all the loading broker's work is done in the managing owner's office (y).

Owner's work in foreign ports is done by the captain, or, in the case of vessels belonging to a regular line, by the branch house abroad, or by the captain, with the advice of the agents of the line, but the system of submarine cables has much lessened the captain's sphere of direct action abroad. On the respective duties of broker and captain abroad to the owner, see *Stumore v. Breen* (z).

Note 2.—Broker's Commission.

In almost all charters a clause is inserted providing for the payment of a commission, usually a percentage upon the freight to be earned thereunder, to the broker who has negotiated the contract. Such a clause does not make the broker a party to the charter, but there is a collateral contract between him and the shipowner, upon which he can sue the shipowner for his commission (a). Moreover, the charterer can sue, as trustee for the broker, upon the covenant by the shipowner in the charter to pay commission to the broker (b).

(x) For an example of the working of such a "ring," see the facts in *Mogul S.S. Co. v. Macgregor* (1889), 23 Q. B. D. 598; (1892) A. C. 25.

(y) Cf. *Williamson v. Hine*, (1891) 1 Ch. 390.

(z) (1886), 12 App. Cas. p. 698.

(a) As in *White v. Turnbull, Martin & Co.* (1898), 3 Com. Cas. 183. The broker not being a party to the charter cannot sue the shipowner upon it as upon a "contract for the carriage of goods" or "an agreement for the use and hire of the ship" under the Admiralty Jurisdiction of the County Courts (32-33 Vict. c. 51); *The Nuova Raffaellina* (1871), L. R. 3 A. & E. 483. Brokerage is not a "necessary" within 3 & 4 Vict. c. 65, s. 6, to sustain an action *in rem*. *The Marianne*, (1891) P. 180.

(b) *Les Affreteurs Reunis v. Walford* (1919), A. C. 801, approving and following *Robertson v. Wait* (1853), 8 Exch. 299.

A commission on "all hire earned" does not entitle the broker to commission on hire which would have been earned but for the cancellation of the charter by the principals without wilful default (c).

The commission is usually payable on freight as and when earned (d). But it may be expressed to be payable on the signing of the charter upon the gross estimated freight, ship lost or not lost, or in like terms (e). Under a clause by which commission was payable "on completion of loading, or should the vessel be lost," and the ship was lost on her way to the loading port, it was held that the broker could recover (f).

The commission may be expressed to be payable on the freight and on demurrage, but in the absence of such expression "Commission at — per cent." will be payable on freight only (g).

(c.) *Captain* (h).

In the absence of express authority from his owners, the captain's authority to bind them by a charter only arises when he is in a foreign port, when his owners are not there, and there is difficulty in communicating with them, and when the charter is a usual one in its terms (i).

Before the arrival of his ship in port, no captain has any authority in law to bind his owners by letters written to an agent in port, asking him to make a charter for

(c) *White v. Turnbull, Martin & Co.*, (1898) 3 Com. Cases, 183; approved in *French v. Leeston Co.*, (1922) 1 A. C. 451; cf. *Broad v. Thomas* (1830), 7 Bing. 99.

(d) A custom that commission is only payable on hire actually earned was held to have been proved in *Harley v. Nagata* (1918), 23 Com. Cas. 121, but was held inconsistent with the charter in *Les Affreteurs Reunis v. Walford*, (1919) A. C. 801.

(e) *Les Affreteurs Reunis v. Walford* (*ubi supra*).

(f) *Ward v. Weir* (1899), 4 Com. Cases, 216. On a similar wording, but with the difference that the charter was a chartering "to arrive," the Scotch Courts came to a contrary conclusion: *Sibson v. Barcraig Co.* (1896), 24 Ct. Sess. Cas., 4th Ser. 91.

(g) *Moor Line v. Dreyfus*, (1918) 1 K. B. 89.

(h) As to the position where the captain works the ship on a system of thirds of the profits, see *Steel v. Lester* (1877), 3 C. P. D. 121, and *Associated Cement Co. v. Ashton*, (1915) 2 K. B. 1.

(i) Thus the captain has no right without instruction to execute a charter, excluding the right of his owners to freight: *Walshe v. Provan* (1853), 8 Ex. at p. 850, *per* Pollock, C.B. See *Thomas v. Lewis* (1878), 4 Ex. D. 18.

the ship before its arrival, and a charter so made would not be binding on the owners, unless subsequently ratified by them (*k*).

Semble (per Brett, L.J.), that a captain not having any authority to make such a contract, cannot when in port ratify it, so as to bind his owners (*k*).

Where the captain is authorised to bind his owners, he will incidentally have the power to employ a broker or agent for this purpose (*l*).

Captains or agents at foreign ports have no authority to vary a charter, without express instructions from their principal (*m*), though they have authority to do all things necessary to perform the contract (*n*).

Article 17.—Who are bound by Charters.

(a.) Part-owner of Shares in Ship.

Any part-owner (*o*) of a ship may object to its employment in any particular way, though such employment is

(*k*) *The Fanny*; *The Mathilda* (C. A.) (1883), 48 L. T. 771. The system of submarine cables has much lessened the captain's duties in foreign ports, the owners now settling the employment of their vessels by telegraph in most cases.

(*l*) *De Bussche v. Alt* (1878), L. R. 8 Ch. D. 286, 310. Story on Agency, par. 201.

(*m*) *Grant v. Norway* (1851), 10 C. B. at p. 687; *Sickens v. Irving* (1859), 7 C. B. N. S. 165; *Burton v. Sharpe* (1810), 2 Camp. 529. For a case when a charter was so varied, see *Hall v. Brown* (1814), 2 Dow. 367, 375; and, for express authority in a charter so to vary, see *Wiggins v. Johnston* (1845), 14 M. & W. 609.

(*n*) The captain has authority to settle accounts to be paid for freight and demurrage in foreign ports, and to take bills of exchange for that amount, so as to bind the shipowner and a purchaser of the ship: *Alexander v. Dowie* (1857), 1 H. & N. 152. The Scotch Courts have held that he has no authority to abandon a claim for demurrage, though he may give the charterers additional lay-days in return for their giving up the option of loading at two additional ports: *Holman v. Peruvian Nitrate Co.* (1878), 5 Sc. Sess. C., 4th Ser. p. 657. In *Dillon v. Livingston and P. & O. Co.* (1895), 11 T. L. R. 313, an agreement by the captain that if the consignees dispensed with weighing, he would accept freight on the bill of lading quantity less two per cent., and pay for short delivery of such two per cent., was held within his authority as master. As to the captain's position in signing bills of lading, see *Repetto v. Millar's Karri Co.*, (1901) 2 K. B. 306.

(*o*) The property in a British ship is divided into 64 shares (Merchant Shipping Act, 1894, s. 5 (i)). Divided ownership of the ship by

under a charter made by a managing owner appointed by himself. In such a case that part-owner will neither share the profits nor be liable for the losses, of such voyage, but will be entitled, in an action of restraint, to a bond from his co-owners to secure the value of his share in the ship, before she will be allowed to sail on the chartered adventure, *(p)*. In such a case the co-owners who do not dissent divide the profits and losses in proportion to their shares *(q)*.

(b.) *Purchaser (r)*.

The purchaser or assignee of any share in a ship under charter is bound by the charter in existence, but is not liable for expenses or losses on charters which were completed before his purchase *(s)*.

The purchaser of a ship under charter is not by the purchase alone bound by or entitled to the benefit of the stipulations in the charter *(t)*.

virtue of separate ownership of such shares used to be common, but is now becoming increasingly rare. The Admiralty Court is given jurisdiction as to all questions between co-owners by sect. 8 of the Admiralty Court Act, 1861.

(p) *The England* (1886), 12 P. D. 32; *The Talca* (1880), 5 P. D. 169. See also *Ouston v. Hebden* (1745), 1 Wils. 101; *Haly v. Goodson* (1816), 2 Mer. 77. As to the liabilities of sureties on such a bond, see *The Vivienne* (1887), 12 P. D. 185. As to position of co-owners, *inter se*, see *Bennett v. Maclellan* (1891), 18 Sc. Sess. C., 4th Sér. 955. The majority of part-owners may not change the character of the ownership without the consent of the minority, as by turning their shares over to a Limited Company: *The Hereward*, (1895) P. 284.

(q) *The Vindobala* (1887), 13 P. D. 42, at p. 47, approving the dictum in "Abbott on Shipping," 12th ed., p. 66.

(r) The sale of a chartered ship, if it involves the change of her nationality, constitutes a breach of the charterparty on the part of the shipowner, for which damages may be recoverable. *Isaacs v. McAllum* (1921), 3 K. B. 377.

(s) *The Vindobala*, *supra*; *The Meredith* (1885), 10 P. D. 69; *Messageries Co. v. Baines* (1863), 7 L. T. 763. See *The Bonnie Kate* (1887), 57 L. T. 203, as to when part-ownership begins. An underwriter on a ship, by acceptance of notice of abandonment of a ship, becomes entitled to freight earned by her subsequently (*Stewart v. Greenock Ins. Co.* (1848), 2 H. L. C. 159), but does not become entitled to the benefit or liable to the obligations of any pending contract of affreightment (*Hickie v. Rodocanachi* (1859), 4 H. & N. 455).

(t) *Spencer's Case* (1853), 3rd resolution, 1 Smith, L. C., 12th ed. p. 62; see Note 2 to Article 1, p. 4, *supra*. If he buys with knowledge of the charter he will be bound by it, and, if his contract of purchase

(c.) *Mortgagor or Mortgagee (u).*

A mortgagor in possession has by statute (x) the powers of an ordinary owner, except that he must not materially impair the value of the mortgagee's security. The mortgagee out of possession is therefore bound by any charter which does not impair his security (y), and the burden of proving that a charter is of such a nature is on him (z).

He cannot object to a charter on the ground that its performance will involve the ship's leaving the jurisdiction, and so render the exercise of his rights more difficult (z); nor to an assignment of freight by the mortgagor as gross freight, the expenses of the voyage not being paid out of it (a); nor to a charter making freight payable to a third party (b).

so provides, entitled to its benefits. The charterer may refuse to have the charter performed vicariously by the purchaser, and sue the vendor for damages. (See Note 2 to Article 1, *supra*.) If the purchaser refuse to perform it, the charterer may get an injunction to restrain him from using the ship otherwise than according to the charter, but, in the absence of novation, the charterer's claim for damages will be against the vendor only, who may then have a claim against the purchaser on his contract of sale.

(u) Under the mortgage of a ship, there pass articles necessary for the navigation of the ship or the prosecution of the adventure which are on board at the date of the mortgage or replace similar articles then on board. *Coltman v. Chamberlain* (1890), 25 Q. B. D. 328: *semble*, articles subsequently added, to which there was nothing corresponding on board at the date of mortgage, do not pass unless they become part of the ship. As to mortgages of ships, to procure funds to work them, see *The Thames* (1890), 63 L. T. 353.

(x) Merchant Shipping Act, 1894, s. 34. "Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof."

(y) *Keith v. Burrows* (1877), L. R. 2 App. C. 636; *Collins v. Lamport* (1864), 34 L. J. N. S. Ch. 196; *The Heather Bell*, (1901) P. 272 (C. A.); *The Fanchon* (1880), 5 P. D. 173; *De Mattos v. Gibson* (1858), 4 De G. & J. 276; *The Maxima* (1878), 39 L. T. 112; *Cory v. Stewart* (1886), 2 T. L. R. 508; *The Keroula* (1886), 11 P. D. 92; *Laming v. Seater* (1889), 16 Sc. Sess. C., 4th Ser. 828. In *The Celtic King*, (1894) P. 175, the mortgagee was held not bound by a contract of employment for five years, so as to prevent him realising his security by sale.

(z) *The Fanchon*, *vide supra*. On the relations of mortgagees of shares, and owners of other shares, see *The Orchis* (1890), 15 P. D. 38.

(a) *The Edmond* (1860), Lush. 57.

(b) *Cory v. Stewart* (1886), *vide supra*. It is doubtful what dealings of the mortgagor will impair the mortgagee's security, *i.e.*, a freight.

But the mortgagee is not bound by a charter, entered into by the mortgagor after the mortgage, which does impair the mortgagee's security—*e.g.*, a charter to carry contraband of war to a port of a belligerent power at a time when insurance against the risk of capture is impossible (c).

A mortgagee of shares out of possession cannot maintain an action of restraint. (*Seem*, that he can, if in possession (d)). A mortgagee out of possession cannot take possession if no sum is due to him under the mortgage, and nothing is done by the mortgagor to impair the security (c). But if the mortgagor deals with the ship in a manner that impairs the security, the mortgagee may take possession, without commencing any proceedings, and even though there has been no actual default under the mortgage (f).

Article 18.—Position of Shipper of Goods on a Chartered Ship.

The issue of a bill of lading does not operate as the creation of a new obligation which puts an end to the old obligations under the charterparty (g).-

Where the ship carrying the goods in respect of which a bill of lading is given is under charter, the position of

earning ship. Lord Esher, in *Cory v. Stewart*, *vide supra*, goes so far as to suggest that, if the mortgagee considers the charter onerous, he should not enter into possession; but see *The Innisfallen* (1865), L. R. 1 A. & E. 72; *The Keroula* (1886), L. R. 11 P. D. 92. In *Lamiré v. Seater, v. s.*, it was held that, when the mortgagor had contracted to insure the ship, the mortgagee was entitled to prevent her going to sea uninsured.

(c) *Law Guarantee Society v. Russian Bank*, (1905) 1 K. B. 815.

(d) *The Innisfallen* (1866), L. R. 1 A. & E. 72; *The Keroula*, (1886), 11 P. D. 92.

(e) *The Blanche* (1887), 58 L. T. 592; *The Cathcart* (1867), L. R. 1 A. & E. at p. 329; *The Heather Bell*, (1901) P. 272 (C. A.).

(f) *The Manor*, (1907) P. 339.

(g) *Den of Airlie S.S. Co. v. Mitsui* (1912), 17 Com. Cas. 116.

the holder of the bill of lading will vary according as he is:—

- (a.) Both shipper and charterer.
- (b.) A shipper other than the charterer; or
- (c.) An indorsee from the shipper.

It may also vary according to the powers conferred, by charter or otherwise, on the master or broker signing the bill of lading (h).

(a.) *Where the Shipper is also the Charterer.*

Where the charterer is himself the shipper, and receives as such shipper a bill of lading in terms differing from the charter, the proper construction of the two documents taken together is that, *prima facie* and in the absence of any intention to the contrary, as between the shipowner and the charterer, the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods (i).

If the holder of the bill of lading is merely an agent or factor of the charterer, he is in the same position as the charterer (k). So also if the charterer takes a bill of lading in his own name, but as agent for a third person, such third person is in the same position as the charterer (l).

The fact that the bill of lading does not contain all

(h) See Article 20.

(i) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67, *per* Lord Esher at p. 75; *Lindley, L.J.*, at p. 78; *cf. Leduc v. Ward* (1888), 20 Q. B. D. at p. 479; *Wagstaff v. Anderson* (1880), 5 C. P. D. at p. 177, *per* Lord Bramwell: "To say that the bill of lading is a contract, superseding, adding to, or varying the former contract, is a proposition to which I can never consent"; repeated less decidedly in *Sewell v. Burdick* (1884), 10 App. C. at p. 105. Where, however, a bill of lading is issued to a shipper, other than the charterer, differing in terms from the charter, and the charterer subsequently becomes indorsee of the bill of lading, the latter is bound by its terms and cannot assert against the shipowner that in his hands the bill of lading is a mere receipt and the charter the only effective contract: *Calcutta S.S. v. Weir*, (1910) 1 K. B. 759.

(k) *Kern v. Deslandes* (1861), 10 C. B. N. S. 205; *Gledstanes v. Allen* (1852), 12 C. B. 202; *Small v. Moates* (1833), 9 Bing. 574.

(l) *Delaurier v. Wyllie* (1889), 17 Sc. Sess. C., 4th Ser. 167.

the terms of the charter (*m*), or that it contains terms not in the charter (*n*), will not necessarily vary the contract between shipowner and charterer (*o*).

But the parties to a charter may agree to vary it; and their agreement to vary may be expressed in the bill of lading given to the charterer (*p*).

Case 1.—C. chartered A.'s ship, "master to sign bills of lading, at any rate of freight, and as customary at port of loading, without prejudice to the stipulations of the charter." C. shipped goods under the charter, and the master signed a bill of lading, containing an exception of "negligence of the master and crew," which was not in the charter. The goods were lost through the master's negligence. *Held*, that the master had no authority to insert such a clause in the bill of lading, which could not prejudice the charter, but was a mere receipt for the goods shipped, and that the shipowners were therefore liable (*q*).

Case 2.—A ship was chartered, the charter containing a power to the master to sign bills of lading without prejudice to the charter and exceptions *inter alia* of "restraint of princes." A shipper, who was practically identified with the charterer, and fully aware of the charter, obtained a bill of lading containing only an exception of perils of the seas. The ship was delayed by restraint of princes. *Held*, that the contract of affreightment was to be found in the charter and bill of lading, and that the one exception in the bill of lading did not supersede the several exceptions in the charter (*r*).

Case 3.—D., as agent for C., negotiated a charter with A. for a lump freight of £735, "the master to sign bills of lading at any rate of freight without prejudice to this charter." C. shipped goods on his own account, and the master signed a bill of lading, making the goods "deliverable to C. or assigns, paying freight as usual." C. indorsed this bill to D. in part payment of advances on the cargo. *Held*, that D., both as agent for C. and as having knowledge of the charter, was liable to A.'s lien

(*m*) *The San Roman* (1872), L. R. 3 A. & E. 583, 592.

(*n*) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67; *Pickernell v. Jauberry* (1862), 3 F. & F. 217; *Caughey v. Gordon* (1878), 3 C. P. D. 419.

(*o*) See note (*i*), *supra*.

(*p*) For instances where such a variation has been effected, see *Gul-lischen v. Stewart* (1884), 13 Q. B. D. 317; *Bryden v. Niebuhr* (1884), 1 C. & E. 241; *Davidson v. Bisset* (1878), 5 Sc. Sess. C., 4th Ser. 709; and note below, p. 56.

(*q*) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67.

(*r*) *San Roman* (1872), L. R. 3 A. & E. 583, 592. An action *in rem* against the ship; though the charterer and shipper were nominally different firms, they were in fact almost identical, and the decision cannot, it is submitted, be supported, except on this ground.

for the whole freight due under the charter, and not merely for the freight in the bill of lading (s).

Case 4.—C. agreed with A. to ship oranges by A.'s ship at 4s. 6d. per box. E., A.'s master, then signed bills of lading for oranges shipped by C. at 3s. 6d. per box. *Held*, that C. was liable for freight at 4s. 6d. and was not relieved by the bill of lading (t).

Case 5.—Charterer (C.) agreed to load a full cargo at a freight of "60s. per ton in full." The master was paid by the ship-owner a fixed salary to include all charges and allowances. He signed a bill of lading making the goods "deliverable to order or assigns, he or they paying freight, etc., as per charter, with 5 per cent. primage for cash on delivery as customary." D., indorsees of the bill of lading as agents of C., received the cargo at the port of discharge. *Held*, that the master could not sue D. for primage either for himself or for the owner (u).

Case 6.—A ship was chartered with the usual stipulations for freight and demurrage, and a cesser clause. The charterers shipped the cargo themselves, accepting bills of lading, making the goods deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charter." In an action by shipowners against charterers as consignees under the bill of lading, for demurrage at the port of discharge—*Held*, they were liable, for the bill of lading only incorporated those clauses of the charter which were consistent with its character as a bill of lading, and did not therefore incorporate the "cesser clause" (x).

(s) *Kern v. Deslandes* (1861) 10 C. B. N. S. 205, based, in *Fry v. Mercantile Bank* (1866), L. R. 1 C. P. 689, on the position that D. really represented C.; and sustainable on that ground, *sed quare*, whether on the facts this was so. *Small v. Moates* (1883), 9 Bing. 574, and *Gledstones v. Allen* (1852), 12 C. B. 202, are similar cases.

(t) *Pickernell v. Jauberry* (1862), 3 F. & F. 217; *cf. Delaurier v. Wyllie* (1889), 17 Sc. Sess. C., 4th Ser. 167, where C. was agent for the real shipper.

(u) *Caughey v. Gordon* (1878), 3 C. P. D. 419. Here the master, without owner's authority, tried to introduce a new term into the contract, contrary to the charter, which could only be for owner's benefit. *Held*, he could not.

(x) *Gullischen v. Stewart* (1884), 13 Q. B. D. 317. See also *Bryden v. Niebuhr* (1884), 1 C. & E. 241; *Davidson v. Bisset* (1878), 5 Sc. Sess. C., 4th Ser. 709. If, instead of expressly incorporating some terms of the charter in the bill of lading, the owner had signed, and the charterers accepted a bill of lading, binding themselves to pay demurrage and freight, without any reference to the charter, this case seems also to show that such a bill of lading would have overridden the cesser clause in the charter. Brett, L.J., in giving judgment against the charterers, said: "Pushed to its legitimate conclusion, the argument for the charterers would free them from liability for freight." The argument was pushed so far, it is submitted, wrongly, by Denman, J., in *Barwick v. Burnyeat* (1877), 36 L. T. 250. In that case the charterers, who were also consignees pleaded that the cesser clause, which exempted them by name, after the ship's loading and payment of advance freight, from subsequent liability, relieved them from any

Note.—The cases of *Rodocanachi v. Milburn* (y) and *Leduc v. Ward* (z), both in the Court of Appeal, brought into prominence the view, that where a charter has been effected, and the charterer himself ships the cargo and takes a bill of lading for the shipment, such a bill of lading is, in the words of Lord Esher (y), “only an acknowledgment of the receipt of the goods, unless there be an express provision in the documents (the charter and bill of lading) to the contrary.” It is submitted that this is stated a little too broadly. It is clear that in the cases of *Gullischen v. Stewart* (x), *Bryden v. Niebuhr* (x), and *Davidson v. Bisset* (x), the contract made between shipowner and charterer in the charter was in effect varied by the bill of lading, and in *Gullischen v. Stewart* (x), at p. 319, Bowen, L.J., speaks of the argument for the charterer as “rendering the bill of lading a nullity: it would be a useless form except as an acknowledgment that the goods had been put on board.” It may be said that in *Gullischen v. Stewart* and *Bryden v. Niebuhr* (x), the liability was not on the contract originally evidenced by the bill of lading, but on the contract implied from the charterer-consignee’s taking the goods under the bill of lading by which he was consignee. But the Court of Appeal do not rest their judgment on this ground, for Brett, M.R., says (at p. 318): “The contract by a bill of lading is different from the contract by a charter, and the defendants are sued upon the contract contained in the bill of lading. It would be absurd to suppose that their liability upon the bill of lading would cease (under the cesser clause) upon the loading of the cargo.” At any rate, in the Scotch case of *Davidson v. Bisset* (a), no such question arose, and Lord Moncrieff there takes an intermediate view: “I should be disposed to say that in matters which relate to the details of the mode in which the contract of carriage is to be performed, the charter may be varied by the bill of lading, although the substance of the contract of affreightment is to be looked for in the charter.” It is submitted that this limitation is unnecessary. If the parties to a

liability under a bill of lading accepted by them, making the goods deliverable “to order or assigns, he or they paying freight for the same, and other conditions as per charter”: and they were held not liable for freight. This case was not cited in *Gullischen v. Stewart* or *Bryden v. Niebuhr*, but seems directly contrary to the principle of those decisions, and must, it is submitted, be taken as overruled.

(y) (1886), 18 Q. B. D. 67.

(z) (1883), 20 Q. B. D. 475.

(a) (1878), 5 Sc. Sess. 4th Ser. 709.

charter wish to vary their contract, even in a substantial point, they can do so; and why not by a bill of lading?

But there appears to be a very serious difficulty in the way of the theory, even thus limited. It is admitted that where a bill of lading given to a charterer differs from the charter-party, though, as between shipowner and charterer, the bill of lading may be "merely in the nature of a receipt for the goods, yet, where it is indorsed over, as between the shipowner and the indorsee, the bill of lading must be considered to contain the contract" (b). The difficulty of this view is that the indorsee has by statute (c) transferred to him by the indorsement all such rights and liabilities, "as if the contract contained in the bill of lading had been made with him." But in the case of the indorsement from the charterer-shipper of a bill of lading differing from the charter, there is, on the doctrine of Lord Esher in *Rodocanachi v. Milburn*, no "contract contained in the bill of lading," but only a "mere receipt." How, then, can the indorsement pass what does not exist? Does a contract spring into existence on the indorsement, which had no existence before? And, if so, what statutory authority is there for such a "creation," as opposed to the "transference" ordained by statute? It may be said as in *Leduc v. Ward* (b), that between shipowner and indorsee the bill of lading must be considered to contain the contract, "because the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods." But this view, which appears to rest on some sort of estoppel against the shipowner, fails in the numerous cases where the variation from the charter is in favour of the shipowner and against the shipper; and is also difficult to reconcile with the admitted law that a shipowner may repudiate against an indorsee for value a bill of lading, which his agent had no authority to give, as for goods not shipped (d). The Scotch Courts had a similar point before them in *Delaurier v. Wyllie* (e)

(b) *Leduc v. Ward* (1888), 20 Q. B. D. at p. 479, per Lord Esher.

(c) 18 & 19 Vict. c. 111, s. 1. Appendix III., post.

(d) *Grant v. Norway* (1851), 10 C. B. 665, and Article 20. In *Diederichsen v. Farquharson* (1898), 1 Q. B. 151, the point seems to have been involved, but not to have been discussed. It is difficult to see how the charterer-shipper could have succeeded in that case, though the consignee, as indorsee from him, did.

(e) (1889), 17 Sc. Sess. C. 167. This case would have illustrated very pointedly the difficulty here discussed, if the coals and the iron had been shipped, as might well have happened, under one bill of lading. In that

(1889), where C., who had made a charter containing a negligence clause, shipped some iron belonging to F. in his own name, taking a bill of lading without a negligence clause. The goods were then lost by negligence, and F. sued the shipowner. The majority of the full Court held that as the shipowners only knew C. in the transaction, the bill of lading was only a receipt to C., and did not become anything more by an indorsement to F. which did not pass to him the property, which he had already. Lord Adam (p. 184) assumes that indorsees for value could sue on the bill of lading alone, but offers no explanation of how the bill of lading contains a contract in their case, when it did not in the case of their indorsers.

(b.) *Where the Shipper is other than the Charterer.*

In this case the question with whom the shipper has contracted, and on what terms, is one of some difficulty, and it is difficult to lay down general rules (f).

If the charter is a demise, so that the captain is the servant of the charterer and not of the owner, a bill of lading signed by the captain or by the charterer binds the charterer, but not the shipowner (g).

In an ordinary voyage charter with a cesser clause, the captain in signing bills of lading usually makes a contract between the owner and the shippers, which may or may not, according to its wording, incorporate some terms of the charter (h). And this may be so, though the charter contains a clause that the captain shall sign bills of lading as agent for the charterers, against shippers who do not know of the clause (i).

event the bill of lading, as regards the iron, would have by the indorsement created contractual rights in the indorsees; but as regards the coal, would have been a "mere receipt" in the hands of the same indorsees.

(f) *Per Walton, J.*, in *Samuel v. West Hartlepool Co.* (1906), 11 Com. C. at p. 125.

(g) *Per Walton, J.*, *ubi supra*, at p. 125; *Baumvoll v. Gilchrist* (1893), A. C. 8; *Marquand v. Banner* (1856), 6 E. & B. 282, as explained in *Gilkison v. Middleton* (1857), 2 C. B. N. S. 134.

(h) *Per Walton, J.*, *ubi supra*, at p. 126; *per Channell, J.*, in *Wehner v. Dene S.S. Co.*, (1905) 2 K. B. at p. 98; *Baumvoll v. Gilchrist, v. s.*; *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86 (C. A.). *Cf. Limerick S.S. Co. v. Coker* (1916), 33 T. L. R. 103.

(i) *Manchester Trust v. Furness, Withy & Co.*, (1895) 2 Q. B. 539.

Where there is a time charter with a clause that the captain shall sign bills of lading as presented without prejudice to the charter, the result ordinarily is that though the contract between the time charterer and shipowner is not affected, the shipowner cannot repudiate the terms of the bill of lading against the shipper (*k*). In some cases there will be no contract with the shipowner, but only with the charterer (*l*); in others, a contract with the shipowner who can look for indemnity to the charterer (*m*). If in form a bill of lading only constitutes a contract with the charterer, but in fact, as between charterer and shipowner, the charterer has authority to contract on behalf of the shipowner, it may be that the holder of the bill of lading can sue the shipowner upon it as an undisclosed principal.

The shipper's knowledge or ignorance of the terms of a charter is relevant in the following ways. If by the terms of a charter the master has no authority to sign a bill of lading in a particular form, which otherwise would be within the general authority of a master, but yet signs such a bill, the shipowner will be bound by it to a shipper ignorant of the terms of the charter (*n*), but not bound to a shipper who knew of those terms.

The burden of proving the shipper's knowledge of the

(*k*) *Turner v. Haji Goolam*, (1904) A. C. 826.

(*l*) *Samuel v. West Hartlepool Co.* (1906), 11 Com. C. 115. This may well be so where the charterers are proprietors of a line of steamers and issue a bill of lading in the form of their line signed by themselves; cf. *Hermann v. Royal Exchange Shipping Co.* (1884), 1 C. & E. 413; *The Okehampton*, (1913) P. 173; and *Bathgate v. Letricheux*, Lloyd's List, 18 March, 1919. In such a case the charterers presumably will not have the benefit of secs. 502 and 503 of the Merchant Shipping Act, 1894, unless they are charterers by demise. Cf. *The Hopper*, No. 66, (1908) A. C. 126.

(*m*) As in *Kruger v. Moel Tryvan Ship Co.*, (1907) A. C. 272; *Elder Dempster v. Dunn* (1909), 15 Com. Cas. 49. But the charterer's signature may make a contract with the owner—as in *Tillmanns v. Knutsford*, (1908) 1 K. B. 185; while the master, though the owner's servant, may bind the charterer and not the owner: *Harrison v. Huddersfield* (1903), 19 Times L. R. 386.

(*n*) This is an application of the principle that secret limitations of a general authority do not affect a third party relying on the general authority.

terms of the charter will be upon the shipowner (o), and a clause in the bill of lading, "all conditions as per charter," will not give the shipper constructive notice of such provisions (p).

Shippers cannot be required to accept bills of lading in accordance with the charter, if such charter involves unusual or onerous terms of which they were ignorant, but can demand their goods back, if shipped, at the ship's expense (q).

Case 1.—A. chartered a ship to C. to sail to X., and load from C.'s agent there, cargo to be stowed at merchant's risk and expense. The captain to sign bills of lading if required at any rate of freight, without prejudice to the charter. At X. goods were shipped by shippers who knew nothing of the charter, under a bill of lading signed by the master. *Held*, that the shippers could sue A., the master having signed as his agent (r).

Case 2.—A. had purchased a ship for the purpose of selling it to C. under an agreement which provided for payment of part of the purchase money down and part at the expiration of a charter of the same date. Under this charter A. agreed to let, and C. to hire the steamer, for four months; charterer to provide and pay for provisions, and wages of captain, officers, engineers, and crew, owner to pay insurance and maintain steamer in an efficient condition during service, charterer to provide and pay for coal, port charges, etc. Payment for use and hire of vessel at £750 per month. Owner has option of appointing chief engineer to be paid by charterer, owner to have lien on cargoes for freights due under charter. C. appointed and paid captain, officers, and crew. A. appointed chief engineer. A. was registered as owner

(o) *The St. Cloud* (1863), B. & L. 4.

(p) *Manchester Trust v. Furness, Withy & Co.*, (1895) 2 Q. B. 539, at pp. 545, 547, 549. See also *West Hartlepool Co. v. Tagart, Beaton & Co.* (1902), 18 Times L. R. 358 at p. 360.

(q) *Peek v. Larsen* (1871), L. R. 12 Eq. 378; *The Stornoway* (1882), 51 L. J. Adm. 27. So also where there are a charter and a sub-charter, and the shipper only knows of one, he will not be bound by the other: *Tharsis Sulphur Co. v. Culliford* (1873), 22 W. R. 46; *The Emilien Marie* (1875), 44 L. J. Adm. 9. So also where a mate's receipt not agreeing with the terms of the shipping note is tendered: *Armstrong v. Allan* (1892), 8 T. L. R. 613. But contrast *Ralli v. Paddington S.S. Co.* (1900), 5 Com. Cases, 124, in which shippers, who knew of the existence of a charter, were held not entitled to demand their goods back from the master on his refusing to sign bills of lading except at the chartered rate of freight, which was higher than that contracted for by shippers with the charterers.

(r) *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86. See also *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106.

and managing owner. F. shipped goods on board, in ignorance of the charter, and received bills of lading, signed by the captain and a broker employed by charterer. In an action, against A. by F. on bills of lading—*Held*, that A. having parted with the possession and control of the vessel, the captain was not his servant so as to bind him by his signature to the bill of lading (s).

Case 3.—A. chartered the *Ferndene* to C. by a time charter, not a demise of the vessel, the captain to be under the orders of the charterers as to employment, and the charterers agreeing to indemnify the owners from all consequences that might arise from the captain signing bills of lading. C. sub-chartered the vessel to O., who contracted with F. for the shipment of goods, for which, the captain then signed bills of lading at the freight arranged between O. and F. *Held*, the bills of lading constituted a contract between A. and F. (t).

Case 4.—A. chartered the *Bombay* to C. by a time charter, not a demise: C. sub-chartered to O., who knew of the charter. O. shipped cargo under bills of lading signed by the master at the sub-charter freight. A. claimed a lien on the cargo for time charter hire. *Held*, that A. was bound or prevented by the issue of the bill of lading from claiming a lien for more than the sub-charter hire (u).

Case 5.—A. chartered the *Lindenhall* to C. by a time charter; C. made a freight contract with F. for the carriage of oil at a named freight, C.'s form of bill of lading to be used. F. shipped oil, and received bills of lading signed by the captain on C.'s form and at the contract rate of freight. *Held*, the contract in the bill of lading was between F. and C., not A. (x).

Case 6.—A ship was chartered with a clause, "In signing bills of lading it is expressly agreed that the captain shall only do so as the agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences and liabilities, if any, that may arise from the captain signing bills of lading or otherwise complying with the same." In other respects the master was the servant of the owners, in whom under the charter the possession and control of the ship remained. The master signed bills of lading containing the clause, "they paying freight and all other conditions as per charter." A claim was made by the shippers on the shipowners under the bill of lading. It was not proved that the shippers knew of the clause in the charter above quoted. *Held*, that the shippers were entitled to sue the

(s) *Baumvöll v. Gilchrest*, (1898) A. C. 8.

(t) *Wehner v. Dene S.S. Co.*, (1905) 2 K. B. 92; cf. *Wastwater S.S. Co. v. Neale* (1902), 86 L. T. 266; and *Limerick S.S. Co. v. Coker* (1916), 83 T. L. R. 103.

(u) *Turner v. Haji Goolam*, (1904) A. C. 826. The judgments appear to decide that the bills of lading were contracts between A. and O.; but the decision can be supported on the ground that there was no contract between A. and O. giving a lien on his goods for time charter freight.

(x) *Samuel v. West Hartlepool S. Nav. Co.* (1906), 11 Com. C. 115.

shipowners and were not affected by constructive notice of the terms of the charter (y).

Case 7.—On June 24, C., brokers, wrote to F., "We now beg to offer you room in ship *R*." On June 26, F. accepted this, and an agreement was drawn up between F. and "C. acting for A., owners of the *R*." On June 25, C. and D. jointly had chartered the *R*. from A., paying a lump freight, their liability to cease on loading. The master signed bills of lading, and on the voyage sold the goods. *Held*, that F.'s remedy was against A. and not against C. (z).

Case 8.—C. chartered a ship from A. and put it up as a general ship. F. put goods on board in ignorance of the charter. The captain refused to sign bills of lading except in terms of the charter, which gave the shipowner liens for demurrage and freight under the charter, and refused to deliver up the goods. *Held*, that shippers who had shipped in ignorance of the charter were entitled to demand their goods back rather than be bound by the provisions of the charter, and that the owners were bound to redeliver them free of any claim for lien or charges (a).

Case 9.—C. chartered a ship from A. and put it up as a general ship. F. shipped goods in it, in which O. had a right of property, and F. was enabled to ship those goods through the negligence of E., the master, in signing bills of lading for them. At the end of the voyage, E., with A.'s approval, delivered the goods to G., consignees under the bill of lading, in spite of O.'s demand for the goods. *Held*, that though E. in signing bills was probably acting as charterer's agent, yet, in delivering the goods at the port of discharge, with A.'s approval, he was acting as A.'s agent, and A. was therefore liable to an action by O. (b).

(c.) *Indorsee from Shipper,*

If a bill of lading given by a shipowner or his agent (c) to the shipper, whether charterer or not, and differing in its terms from the charter, comes into the

(y) *Manchester Trust v. Furness, Withy & Co.*, (1895) 2 Q. B. 539 (C. A.).

(z) *Wagstaff v. Anderson* (1880), 5 C. P. D. 171 (C. A.).

(a) *Peek v. Larsen* (1871), L. R. 12 Eq. 378. The question would seem to be whether the shippers were, or should in reason have been, aware of the terms of the charter. See *Watkins v. Rymill* (1883), 10 Q. B. D. 178; *Ralli v. Paddington S.S. Co.* (1900), 5 Com. Cases. 124.

(b) *Schuster v. McKellar* (1857), 7 E. & B. 704. F. could only have sued E. or C. under the bill of lading; and, if A. had demised the ship to C., O. could only have sued C.; but as there was no demise, and O. did not sue in contract under the bill of lading, but in tort, A. was liable to O.

(c) *Cf. Baumvöll v. Gilchrest*, (1893) A. C. 8.

hands of G., a *bonâ fide* holder for value of such bill of lading (*d*).

I. If G. is ignorant of the terms of the charter, the shipowner will be bound by the bill of lading (*e*), even though his agent had no authority to sign it, provided that such bill is on its face within the ordinary authority of a master or broker (*f*), and that the difference in terms has not been obtained by fraud of any previous holder (*g*).

II. If G. is aware of the terms of the charter, the shipowner will not be liable to G. upon a bill of lading signed by his agent beyond any authority conferred by such charter (*h*).

III. In any case the terms of the charter will not be incorporated in the bill of lading without a plain expression in the bill of lading of the intention to do so (*i*), neither will the indorsee be bound by verbal negotiations with the shipper not embodied in the bill of lading (*k*).

(*d*) But where G. had before indorsement the property in the goods represented by the bill of lading, which was taken by the charterer as G.'s agent, the bill of lading was held only a receipt, and G. was bound by the charter: *Delaurier v. Wyllie* (1887), 17 Sc. Sess. C. 167, *et supra*, p. 57.

(*e*) *The Patria* (1871), L. R. 3 A. & E. 436; *Gilkison v. Middleton* (1857), 2 C. B. N. S. 1, 34; but see note on p. 56, *supra*, on difficulties where the shipper is charterer.

(*f*) *Grant v. Norway* (1851), 10 C. B. 655, at pp. 687, 688; *Cox v. Bruce* (1886), 18 Q. B. D. 147; *Reynolds v. Jew* (1865), 7 B. & S. 86. And see Article 20, *post*, and footnote (*g*), p. 72.

(*g*) *Mitchell v. Scatfe* (1815), 4 Camp. 298.

(*h*) The shipowner in such a case must prove that the bill of lading holder did know of the terms of the charter. See Case 6 (*The Drappener*), *infra*. See also *Harrison v. Huddersfield* (1903), 19 Times L. R. 386, and Article 20, *infra*.

(*i*) *Chappel v. Comfort* (1861), 10 C. B. N. S. 802; *Fry v. Mercantile Bank of India* (1866), L. R. 1 C. P. 689; *Smith v. Sieveking* (1855), 4 E. & B. 945. "Where a charter is entered into, the special provisions of that charter are binding only as between the charterer and shipowner, and if a bill of lading is signed by the master, and that bill of lading comes to the hands of an assignee for value, the latter is entitled to have the goods delivered to him on the terms mentioned in the bill of lading, and, properly speaking, is not bound to refer to the charter at all" (Willes, J., in *Chappel v. Comfort*, at p. 810). This is subject to the reference to the charter for any of its terms expressly incorporated in the bill of lading. And see, *post*, Article 19.

(*k*) *Leduc v. Ward* (1888), 20 Q. B. D. 475.

Case 1.—A ship was chartered with certain excepted perils, including “restraint of princes.” F. shipped goods in ignorance of the charter, and the master signed a bill of lading only containing an exception of “perils of the sea.” In an action *in rem* by G., the consignees, who also were ignorant of the charter, against ship, owner, and master, for failing to deliver through “restraint of princes,” *held*, that the owner was liable, and that the contract in the bill of lading was not affected by the contract in the charter of which F. and G. were ignorant (*l*).

Case 2.—A ship was chartered by C. for a certain voyage, at a certain freight with a lien on the cargo for all freight, the master to sign bills of lading without prejudice to the charter. C. shipped goods for which the master signed a bill of lading, making the goods deliverable to G., “paying freight as per margin, i.e. £196.” C. indorsed the bill of value to G. *Held*, that the owners having by their master signed bills making the goods deliverable on payment of a certain freight, could only claim that freight, and not the whole freight for which they had a lien under the charter, as against consignees who had advanced money on faith of the statements in the bill of lading (*m*).

Case 3.—A. chartered a ship to C. at a certain freight, “A. or his agent to sign bills of lading at any rate of freight without prejudice to this charter.” D., C.’s agent abroad, advanced money to the ship, and in consideration of such advance the master loaded goods from D., giving a bill of lading, “shipped by D., to be delivered to order, or assigns, paying freight to D.’s agent, G., as per margin.” *Held*, that the master had no authority to make such a contract, and that A. was not bound by it to G., consignees of cargo (*n*).

Case 4.—C. chartered a ship from A. to pay a certain freight, sixteen lay-days and demurrage at £2 *per diem*. C. shipped a cargo consigned to G. in London under a bill of lading, “paying freight as per charter,” with a memorandum in the margin, “There are eight working days for unloading in London.” The

(*l*) *The Patria* (1871), L. R. 3 A. & E. 436. Otherwise if F. had shipped through C., the charterer, as his agent. *Delawier v. Wyllie* (1889), 17 Sc. Sess. C. 167.

(*m*) *Gilkison v. Middleton* (1857), 2 C. B. N. S. 134. See also *Mitchell v. Seafie* (1815), 4 Camp. 298. This case is distinguishable from cases like *Kern v. Deslandes* (1861), 10 C. B. N. S. 205, by the fact that the holder is an indorsee for value, and not a mere agent or factor. Here too the owners seem to have authorised the signing of the bill of lading (see *per Cockburn, C.J.*), and so varied their lien. We have omitted the part of the case which was overruled in *Kirchner v. Venus* (1859), 12 Moore, P. C. 361, as to whether there was a lien for freight at all. See also *West Hartlepool Co. v. Tagart, Beaton & Co.* (1902), 18 Times L. R. 358; 8 Com. Cas. 183 (C.A.).

(*n*) *Reynolds v. Jew* (1865), 7 B. & S. 86. Such a contract as to freight was beyond the usual authority of a master, and should have put G. on inquiry. See also *Arrospe v. Barr* (1881), 8 Sc. Sess. C., 4th Ser. p. 602; *The Canada* (1897), 13 T. L. R. 238.

vessel was detained four days beyond her lay-days. G. was sued by A. for demurrage. *Held*, that as the bill of lading did not clearly show that the conditions as to demurrage in the charter were incorporated in the bill of lading, G. was not liable (o).

Case 5.—F. shipped goods on A.'s vessel, and took a bill of lading, setting out that the vessel was lying at X. and bound for Z., with liberty to call at any ports in any order. F. knew that the ship was going to Z. by way of Y., which was altogether out of the course of a voyage from Z. to X. F. indorsed the bill of lading to I. The ship proceeded to Y., and was lost on the way. *Held*, that I. was not prevented from recovery for the deviation, by F.'s knowledge of the course of the voyage, such knowledge not being embodied in the bill of lading (p).

Case 6.—F. agreed to sell certain goods to P. on c.i.f. terms. The contract of sale provided "tonnage to be engaged on the terms of the annexed charter." There was annexed a form of charter which contained a negligence clause. F. chartered a steamer to carry the goods by a form of charter containing a negligence clause. The goods were shipped, and the captain executed a bill of lading which did not contain a negligence clause. P. became indorsee of the bill of lading. Some of the goods were lost on the voyage owing to negligent navigation. P. sued the shipowner upon the bill of lading for short delivery. *Held*, that there was *prima facie* evidence that P. knew of the contents of the charter effected by F., and that therefore the shipowner was not liable (q).

Article 19.—Incorporation of Charter in Bill of Lading.

Where the holder of a bill of lading for goods shipped on a chartered vessel is either a shipper other than the charterer, whether aware of the charter or not (r), or an assignee of such bill for value, even from the charterer (s), the stipulations of the charter on any particular point will not be incorporated into the bill of

(o) *Chappel v. Comfort* (1861), 10 C. B. N. S. 802.

(p) *Leduc v. Ward* (1888), 20 Q. B. D. 475.

(q) *The Draupner*, (1909) P. 219; (1910) App. Cas. 450. The Courts below held that the shipowner had not discharged the onus of proving knowledge of the terms of the charter in the shipper. The House of Lords held that he had.

(r) *The Patria* (1871), L. R. 3 A. & E. 436. But where the charterer took a bill of lading in his own name, but as agent for F., the real owner of the goods, to whom he indorsed the bill of lading, F., was held bound by the charter though the bill of lading did not refer to it. *Delaurier v. Wyllie* (1889), 17 Sc. Sess. C. 167, and see p. 57, *supra*.

(s) *Fry v. Mercantile Bank of India* (1866), L. R. 1 C. P. 689.

lading without a plain expression in the bill of lading of the intention to do so (*t*).

Where such an intention plainly appears it will be adopted; thus the clause "freight and all other conditions as per charter" will incorporate into the bill of lading all conditions in the charter to be performed by the consignee of the goods (*u*) applicable to and consistent with the character of the bill of lading (*x*), or relevant to his right to take delivery of the cargo (*y*), but not inapplicable or insensible conditions (*z*), or clauses of the charter which would alter express stipulations in the bill of lading (*a*) or which are not conditions to be performed by the consignee (*u*).

Under such a clause holders of the bill of lading have been held liable for charterparty demurrage at the port of loading (*b*) or at the port of discharge (*c*), bound by

(*t*) *Chappel v. Comfort* (1861), 10 C. B. N. S. 802; *Smith v. Sieving* (1855), 4 E. & B. 945; *Wegener v. Smith* (1854), 15 C. B. 285.

(*u*) *Serraino v. Campbell*, (1891) 1 Q. B. 283; following *Russell v. Niemann* (1864), 17 C. B. N. S. 163, at p. 177, and *dicta* in *Taylor v. Perrin* (1883) (unreported decision of the House of Lords); *Delaurier v. Wyllie* (1889), 17 Sc. Sess. C. 167. *Diederichsen v. Farquharson*, (1898) 1 Q. B. 151 (C. A.); *Manchester Trust v. Furness, Withy*, (1895) 2 Q. B. 539, (C. A.). See the latter case at pp. 545, 547, 549, as to the doctrine of constructive notice in mercantile transactions. See also *The Draupner*, (1910) A. C. 450, and *The Northumbria*, (1906) P. 292.

(*x*) *Porteus v. Watney* (1878), 3 Q. B. D. 534, at p. 542 (C. A.); *Gardner v. Trechmann* (1884), 15 Q. B. D. 154 (C. A.). *Howitt v. Paul* (1878), 5 Sc. Sess. C., 4th Ser. p. 321, where the words "paying freight as per charter" were held to incorporate a stipulation for the payment to the captain of a gratuity for "good delivery."

(*y*) *East Yorkshire S.S. Co. v. Hancock* (1900), 5 Com. Cases, 266.

(*z*) *Gullischen v. Stewart* (1884), 13 Q. B. D. 317 (G. A.); *Bryden v. Niebuhr* (1884), 1 C. & E. 241; but see *Barwick v. Burnyeat* (1877), 38 L. T. 250, and Note, *supra*, p. 56.

(*a*) *Gardner v. Trechmann* (1884), 15 Q. B. D. 154 (C. A.). See *Case 9 (Red R. S.S. Co. v. Allatini)*, *infra*, and see *Oostzee Stoomvaart v. Bell* (1906), 11 Com. Cas. 214, following *The Emmy* (Shipping Gazette, 9 Aug. 1905), for a difficult case as to the consistency of charterparty and bill of lading.

(*b*) *Gray v. Carr* (1871), L. R. 6 Q. B. 522.

(*c*) *Porteus v. Watney* (1878), 3 Q. B. D. 534 (C. A.); disapproving *Rogers v. Hunter* (1827), M. & M. 63; *Dobson v. Droop* (1830), M. & M. 441; *quære*, whether the charter would not be satisfied by the charterers receiving £10 *per diem* from one shipper, though in justice such shipper should have a right, which he has not in law, to require contribution from other shippers. See also *Straker v. Kidd* (1878), 3 Q. B. D. 223; *Leer v. Yates* (1811), 3 Taunt. 387; *Harman v. Gandolph* (1815), Holt, N. P. 35. See Note 2 to Article 135 on p. 363.

a clause in the charterparty giving a lien for dead freight (*d*), and entitled to the benefit of a clause that the ship should discharge in the dock ordered by charterers (*e*). But the cesser clause (*f*), or arbitration clause (*g*), or clauses as to the liability of the shipowner, such as the exceptions in the charter (*h*), or a clause in the charterparty that the bills of lading shall be conclusive evidence of the amount of cargo shipped (*i*), or a clause that the captain shall sign bills of lading as agent of the charterer and not of the shipowner, will not be incorporated in the bill of lading (*k*).

Note.—The phrase “he paying freight according to the charterparty” is at least as old as 1539 (*l*).

Case 1.—C. chartered a ship from A., “the ship to have a lien on cargo for freight 70s. per ton . . . to be paid on unloading of the cargo.” C. shipped part of the cargo under a bill of lading containing a clause, “freight for the said goods payable in Z. as per charter,” and indorsed the bill for value to I. *Held*, that

(*d*) *Kish v. Taylor*, (1912) A. C. 604, at p. 614.

(*e*) *East Yorkshire S.S. Co. v. Hancock* (1900), 5 Com. Cases, 266.

(*f*) See note (*z*), *supra*.

(*g*) *Thomas v. Portsea S.S. Co.*, (1912) A. C. 1, following *Hamilton v. Mackie* (1889), 5 Times L. R. 677. For cases as to the incorporation of the arbitration clause in a colliery guarantee into the charter, see *Weir v. Pirie* (1898), 3 Com. Cases, 263, 271; *Clink v. Hickie, Borman & Co.* (1898), 3 Com. Cases, 275. In *Temperley S.S. Co. v. Smyth* (1905), 2 K. B. 791, an arbitration clause as to demurrage at the port of loading in a charter with a cesser clause was held incorporated in a bill of lading given to the charterers, and *Runciman v. Smyth* (1904), 20 Times L. R. 625 was overruled. *Hamilton v. Mackie* (*supra*) was said to depend on the special terms of the clause and upon the fact that the bill of lading holder was not the charterer. As to the right of the charterer to claim arbitration under a charter when he has indorsed and assigned a bill of lading issued under it, see *Den of Airlee S.S. Co. v. Mitsui* (1912), 17 Com. Cas. 116.

(*h*) *Russell v. Niemann* (1864), 17 C. B. N. S. 163. Exceptions in the charter may be incorporated by apt words in the bill of lading, *e.g.*, “All other conditions and exceptions as per charterparty,” or “all other conditions (including negligence clause) as per charter” (*cf. The Northumbria*, (1906) P. 292). For a special case in which under such a clause the printed exceptions in the charter were held not to be incorporated, see *The Modena* (1911), 16 Com. Cas. 292.

(*i*) *Hogarth Co. v. Blyth & Co.*, (1917) 2 K. B. 534.

(*k*) Note (*u*), p. 66, *supra*.

(*l*) See bill of lading of that date in Marsden, *Select Pleas of the Admiralty Court* (Selden Society, 1892), Vol. I., p. 89. Other examples dated 1541 and 1544 appear *ibid.* pp. 112, 126.

against I. the shipowner had a lien only for the freight due for the goods included in the bill of lading, and not a lien for the whole chartered freight (*m*).

Case 2.—C. chartered a ship from A. with a clause that fourteen working days were allowed for loading and unloading, and ten days on demurrage at £35 a day. F. shipped corn under a bill of lading, "paying freight for the same goods, and all other conditions as per charter." F. indorsed the bill to I. for value. At the port of discharge, owing to delay of other shippers, I. was delayed in removing his goods, and three days' demurrage was incurred. *Held*, that I. was liable to pay demurrage as per charter. *Scmble*, that A. could recover the demurrage for the three days from each of the shippers (*n*).

Case 3.—A charter provided for payment of freight at £1 11s. 3d. per ton, and gave the shipowner an absolute lien for freight: "the bill of lading provided for payment of freight at £1 2s. 6d. per ton, "extra expenses to be borne by the receivers, and other conditions as per charter." *Held*, not to incorporate in the bill of lading the clauses of the charter as to freight (*o*).

Case 4.—A ship was chartered by C. from A. with the usual stipulations for freight and demurrage and a cesser clause. C. shipped the cargo, accepting bills of lading making the goods deliverable to himself at the port of discharge; "he paying freight and all other conditions as per charter." In an action by A. against C. as consignee under the bill of lading, for demurrage at the port of discharge. *Held*, C. was liable; for the bill of lading only incorporated those clauses of the charter which were consistent with its character as a bill of lading, and did not therefore incorporate the "cesser clause" (*p*).

Case 5.—A ship was chartered by C. from A., "fifty running days to be allowed for loading, and ten days on demurrage over and above the said lay-days at £8 per day . . . A. to have a lien for demurrage," and a cesser clause. C. shipped goods under a bill of lading "to be delivered as per charter unto, order of C. or assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred for the said goods) as per charter." The ship was detained in loading ten days on demurrage, and eighteen days more. A. claimed a lien for demurrage for ten days, and damages for the eighteen days' detention against G., consignee under the bill of lading. *Held*, that G. was

(*m*) *Fry v. Mercantile Bank of India* (1866), L. R. 1 C. P. 689. See also *Mitchell v. Scaife* (1815), 4 Camp. 298. The Court based their decision on the grounds: (1) That a clear intention to give the extended lien was not shewn (*Chappel v. Comfort*, note (*t*), *supra*); (2) That the charter fixed the rate of freight and not a lump freight, and this only was incorporated in the bill of lading. Such a division of liability will not be applied to demurrage: *Porteus v. Watney*, *vide* Case 2.

(*n*) *Porteus v. Watney*, (1878) 3 Q. B. D. 534.

(*o*) *Gardner v. Trechmann* (1884), 15 Q. B. D. 154.

(*p*) *Gullischen v. Stewart* (1884), 13 Q. B. D. 317.

liable for the demurrage, but not for the damages for detention, which were not given by the charter or the bill of lading (*q*).

Case 6.—A. chartered a ship to C., the charter containing a negligence clause; F. shipped goods under a bill of lading, without a negligence clause, but containing a clause "to be delivered to order or assigns, they paying freight for the said coals, and all other conditions as per charter." The ship was lost through negligence; F. sued A. *Held*, that the bill of lading only incorporated such conditions of the charter as were to be performed by the consignee, and not other clauses, and that therefore A. was not protected by the negligence clause in the charter (*r*).

Case 7.—Under a charter containing a clause allowing a deck cargo "at merchant's risk," a bill of lading for deck cargo was given containing no exceptions, but the words, "freight and all other conditions as per charter." The consignees claimed for damage to the cargo. *Held*, by the C. A. (Rigby, L.J., dissenting), that they were entitled to succeed, the clause in the charter not being incorporated in the bill of lading (*s*).

Case 8.—Goods were shipped under a charter which contained a clause excepting the shipowners from loss or damage from various perils, "even when occasioned by negligence of the master . . . or other servants of the shipowners . . . or by unseaworthiness . . . not resulting from want of due diligence by the owners, etc." A bill of lading was issued containing the words "all other conditions as per charterparty, including negligence clause." In a suit by the bill of lading holder against the shipowners for damage, alleging unseaworthiness, *held*, that the whole of the exceptions clause in the charterparty, including the exemption as to unseaworthiness, was incorporated into the bill of lading (*t*).

Case 9.—Charterparty for the shipment of a full cargo of wheat or maize at 12s. per ton. Provision (in effect) that oats or barley might be shipped, and if so, there should be a lump sum freight equivalent to the total freight of a full and complete cargo of wheat or maize at the above rate. The charterers only half filled the ship, and with oats and barley only. Bills of lading for this cargo were issued providing that the consignees should "pay freight . . . and perform all other conditions . . . as per charter at the rate of freight as per charter per ton of 2240 lbs. gross weight delivered." In a suit against the consignees for the lump sum freight under the charter, *held*, that the consignees were only

(*q*) *Gray v. Carr* (1871), L. R. 6 Q. B. 522.

(*r*) *Serraino v. Campbell*, (1891) 1 Q. B. 283; *cf. Delaurier v. Wyllie* (1889), 17 Sc. Sess. C. 167; and compare *Manchester Trust v. Furness*, (1895) 2 Q. B. 539, where a clause making the captain the agent of the charterer to sign bills of lading was *held* not incorporated in the bill of lading.

(*s*) *Diederichsen v. Farquharson*, (1898) 1 Q. B. 151 (C. A.). In this case the shipper, who was also the charterer, could not, it is submitted, have sued with success.

(*t*) *The Northumbria*, (1906) P. 292.

liable for 12s. per ton of the oats and barley delivered, the words in the bill of lading, "per ton of . . . gross weight delivered," being inconsistent with the incorporation of the charterparty lump sum freight (u).

Case 10.—A charterparty contained a clause, "captain to sign Eastern trade bills of lading which are to be deemed conclusive proof of cargo shipped." The captain signed bills of lading with the qualification, "weight, measure, quality, contents, and value unknown," and containing the phrase, "freight and all other conditions and exceptions as per charterparty." On a claim for short delivery, *held*, that the conclusive evidence clause in the charter was not incorporated into the bill of lading, and that the shipowner, in an action on the bill of lading, was not debarred from proving that all the goods shipped had in fact been delivered (x).

Article 20.—*Authority of Master or Broker to sign Bills of Lading (y).*

I. *Where no Goods are Shipped.*

The master or broker cannot bind the owner or principal by signing bills of lading for goods that were never shipped at all (z); but the bill of lading is *prima facie*

(u) *Red R. S.S. Co. v. Allatini* (1909), 14 Com. Cas. 82. In *Brightman v. Miller* (Shipping Gazette, 9 June, 1908) the charter and the bills of lading were in similar terms, except that the words, "at the rate of freight as per charter per ton of 2,240 lbs. gross weight delivered," were omitted. *Held*, that each of the bill of lading holders was liable for such a proportion of the lump sum freight under the charter as the amount of his consignment bore to the amount of the total consignments under all the bills of lading.

(x) *Hogarth & Co. v. Blyth & Co.*, (1917), 2 K. B. 534.

(y) The question of authority to sign bills of lading does not often arise, as each line has its printed form, or forms, which are hardly ever varied. When a ship is under charter, and is put up by the charterers as a general ship, power is usually given to the master by the charter to sign bills of lading in any form, "without prejudice to the charter," i.e., to the contract between shipowner and charterer (see *Note 2, post*, p. 77). In actions for damage to goods, where bills of lading have been signed by a broker abroad, and it is difficult to prove his authority, an alternative claim in tort will generally be successful. On the statutory liability of the person signing a bill of lading for goods not shipped, see the Bills of Lading Act (1855), s. 3: Appendix III., and Article 21.

(z) *McLean v. Fleming* (1871), L. R. 2 Sc. App. 128; *Brown v. Powell Duffryn Coal Co.* (1875), L. R. 10 C. P. 562; *Jessel v. Bath* (1867), L. R. 2 Ex. 267; *Grant v. Norway* (1851), 10 C. B. 665. This is so, though the goods were brought alongside the ship and mate's

evidence that they were shipped, and the burden of disproving it lies on the owner (a). But where the statement of the amount or quantity of the goods in the bill of lading is qualified by such words as "Weight or quantity unknown," the bill of lading is not even *prima facie* evidence against the shipowner of the amount or quantity shipped, and the onus is on the cargo-owner of proving what in fact was shipped (b).

Neither can the master or broker bind the owner by signing a second bill of lading for goods on board, for which he has already signed one bill (c).

Such a bill has no further binding effect (d), even in the hands of a *bona fide* holder for value.

The owner may, however, by express stipulation bind himself to accept the statement of quantity shipped in the bill of lading, though all the goods enumerated therein are not shipped (e).

Case 1.—C. chartered a ship of the capacity of 596 tons, from A., to carry bones. The master signed bills of lading representing that 701 tons were shipped, but containing the clause, "weight,

receipts given for them. *Thorman v. Burt* (1886), 54 L. T. 349. Though the owner is not liable, "the master or other person signing" the bill of lading may be liable under sect. 3 of the Bills of Lading Act, 1855.

(a) *Smith v. Bedouin Nav. Co.*, (1896) A. C. 70; *Harrowing v. Katz* (1894), 10 Times L. R. 400, affirmed by H. L., Nov. 26, 1895, see note in (1896) A. C. at p. 73; *Bennett and Young v. John Bacon, Ltd.* (1897), 2 Com. Cases, 102 (C. A.), in all of which cases the evidence of the bill of lading was not displaced; also *Hine v. Free, Rodwell & Co.* (1897), 2 Com. Cases, 149, where the evidence of the bill of lading was displaced by evidence of disputed tallies, the counterfoils of the mate's receipts, and the displacement scale. The evidence to displace the bill of lading must show not merely that the goods may not have been shipped, but that they were not (1896) A. C. at p. 79; but this may be shown by conclusive evidence that after receipt by the shipowner none of the goods were lost or stolen and that he has delivered all that he received. *Sanday v. Strath S.S. Co.* (1920), 26 Com. Cas. 163, 277.

(b) *New Chinese Co. v. Ocean S.S. Co.*, (1917) 2 K. B. 664, following *Jessel v. Bath* (1867), L. R. 2 Exch. 267, and disregarding the *dictum* of Lord Chelmsford in *McLean v. Fleming* (1871), L. R. 2 H. L. Sc. at p. 130. Cf. *Craig Line v. North British Co.*, (1921) Sess. Cas. 114.

(c) *Hubbersty v. Ward* (1853), 8 Ex. 330.

(d) See note (2), *supra*.

(e) *Lishmann v. Christie* (1887), 19 Q. B. D. 333; doubting the authority of *Pyman v. Burt* (1884), 1 C. & E. 207; *Crossfield v. Kyle S.S. Co.*, (1916) 2 K. B. 885. See Note, p. 73.

quality, and contents unknown." On arrival, the ship was found to have only 386 tons on board; the master had protested for inadequacy of freight. *Held*, that the signature of the master to the bills threw upon A. the burden of disproving the shipment of the goods, but that he had disproved it by the evidence of the master that he delivered all goods that were shipped, and by the protest (f).

Case 2.—E., master of A.'s ship, gave a bill of lading to F. for twelve bales of silk represented as being shipped on such ship; F. indorsed the bill for value to I.; the goods never had been shipped. I. sued A., who proved that the goods never were on board. *Held*, that A. was not liable, even to I. (g).

Case 3.—F. shipped on board A.'s ship seventy and seventy-five quarters of wheat, and received bills of lading signed by E., A.'s master. F. indorsed these bills to I. F. then induced E. by fraud to sign another bill of lading for 145 quarters, which he indorsed to H. E. delivered to H. under the second bill. I. then sued A. *Held*, that E. had no authority to sign H.'s bill, which was a second bill, having already signed one bill for the same goods, and that, as I.'s bills were prior and genuine, I. was entitled to recover (h).

Case 4.—Sleepers were shipped under a charter containing this clause, "the bill of lading shall be conclusive evidence against the owner of the quantity of cargo received;" 2000 sleepers were delivered in the water alongside of the ship, and the mate signed a receipt for them; some were lost before shipment, but the captain signed a bill for the whole 2000, knowing that some were not shipped, and making some slight protest. *Held*, that the shipowner, having agreed to be bound by the statement in the bill of lading, was estopped from disputing its truth, though, apart

(f) *McLean v. Fleming* (1871), L. R. 2 Sc. App. 128.

(g) *Grant v. Norway* (1851), 10 C. B. 665. The question as to the right of the indorsee had been left undecided in *Berkeley v. Watling* (1837), 7 A. & E. 29. At first sight *Grant v. Norway* appears inconsistent with such cases as *Gilkison v. Middleton* (1857), 2 C. B. N. S. 134; *Howard v. Tucker* (1831), 1 B. & Ad. 712; *Mitchell v. Scaife* (1815), 4 Camp. 298; in which statements as to liability for freight in a bill of lading were held to bind the owner as against an indorsee for value, though such statements limited the charter, and were made without the owner's authority. The distinction seems to be that in these cases the owner recognises a contract of carriage made by his master, but seeks to vary the terms of it; while, in *Grant v. Norway* and similar cases, he repudiates any contract of carriage, for no goods were ever shipped to be carried, and therefore there was no contract of affreightment to embody in a bill of lading. The distinction is hardly very satisfactory, especially to the innocent holder, who has advanced money in good faith on the representation that there are goods in the ship to which his bill of lading entitles him. *Grant v. Norway* is really an illustration of the principle that a person knowing that an agent has a limited authority is put on inquiry as to whether the act done is within the authority.

(h) *Hubbersty v. Ward* (1853), 8 Ex. 330.

from such agreement, the captain had no authority to sign such a bill of lading (i).

Note.—The clause in Case 4, commonly known as “the conclusive evidence clause,” is usually inserted in timber bills of lading (k). With such a clause (and the variation of “delivered to the ship” in place of “received” makes no difference (l)) the shipowner will be liable, though it is otherwise clear that the timber was not “received” or “taken on board.” And where with such a clause the bill of lading specifies quantities of different sorts of goods (e.g. deals and boards), he is equally bound as to both; so that if there is a short delivery of deals and an over-delivery of boards, he cannot take the two together as representing the total quantity of both (m). To free himself, the shipowner must prove loss by excepted perils after “taking on board”; loss by excepted perils alongside the ship will not do (n). Shipowners have sometimes met the difficulty by adding to the statement of cargo shipped in the bill of lading a marginal note, “so many timbers of above lost alongside,” or similar words. This seems to make the bill of lading contain no conclusive statement of quantity shipped, and it was so treated in *Lohden v. Calder* (o).

II. Where Goods are shipped.

(1.) The Ship not being chartered.

(a) If the owner has given no express instructions to his master, he will be bound by any term of the bill of lading within the ordinary authority of a master (p).

(i) *Lishmann v. Christie* (1887), 19 Q. B. D. 333; doubting the authority of *Pyman v. Burt* (1884), 1 C. & E. 207. See also *Thorman v. Burt* (1886), 54 L. T. 349; and *Note* following this case.

(k) *Semble*, that a captain signing bills of lading for charterers has not authority to bind his owners by a bill of lading containing the conclusive evidence clause. *Thin v. Liverpool, Brazil Co.* (1901), 18 Times L. R. 226.

(l) *Crossfield v. Kyle S.S. Co.*, (1916) 2 K. B. 885.

(m) *Mediterranean Co. v. Mackay*, (1903) 1 K. B. 297.

(n) *Fisher v. Calder* (1896), 1 Com Cases, 456.

(o) (1898), 14 Times L. R. 311. See also *Oostzee Stoomvaart v. Bell* (1906), 11 Com. Cas. 216.

(p) *E.g.*, by a statement that goods have been shipped “in good order and condition.” *Compania, &c. v. Churchill*, (1906) 1 K. B. 237. *Cf. Martineaus v. Royal Mail Co.* (1912), 17 Com. Cas. 176.

He will not be bound by any term outside such ordinary authority (*q*).

(b) If the owner has given express instructions to his master, he will be bound by any bill within those instructions, or by any bill within a master's ordinary authority, given to a shipper ignorant of those instructions. .

He will not be bound by any bill beyond the master's ordinary authority and his instructions, or by any bill beyond the master's instructions given to a shipper knowing of such instructions (*q*).

Case 1.—Jute was shipped under a bill of lading containing a clause, "If quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading contained the quality marks specified in the shipping notes, but these were wrong, so that the bill of lading did not accurately represent the goods shipped. All goods shipped were delivered; in an action by indorsee for value, for the non-delivery of goods specified in the bill of lading, *held*, that it was not within the ordinary authority of a master to certify the mercantile quality of goods [or *semble*, to insert quality marks at all], and, following *Grant v. Norway* (*r*), that a contract or representation by the master outside his ordinary authority did not bind his owners (*s*).

Case 2.—Timber was shipped under a bill of lading signed by the master, which stated it to be "shipped in good order and condition." It had, in fact, been damaged by oil before shipment, as the master knew, or could have known. *Held* (distinguishing *Cox v. Bruce* (*s*)), that it was within the authority of the captain to certify the *condition* of goods, and that the shipowners were as against an indorsee of the bill of lading bound by the admission (*t*).

(*q*) See *Grant v. Norway* (1851), 10 C. B. 665; *Cox v. Bruce* (1886), 18 Q. B. D. 147; *Reynolds v. Jew* (1865), 7 B. & S. 86. As to "the ordinary authority of a master," see *Note 1*, p. 76, *post*.

(*r*) *Grant v. Norway* (1851), 10 C. B. 665. See also *Walshe v. Provan* (1853), 8 Ex. 843. For an instance of authority to carry freight free, see *Mercantile Exchange Bank v. Gladstone* (1868), L. R. 3 Ex. 233, 240.

(*s*) *Cox v. Bruce* (1886), 18 Q. B. D. 147.

(*t*) *Compania &c. v. Churchill*, (1906) 1 K. B. 237, followed in *Martineaus v. Royal Mail Co.* (1912), 17 Com. Cas. 176.

(2.) *The Ship being chartered.*

In the absence of any special provisions in the charter, or express instructions (*u*), the master or broker has no authority to vary the contract the owner has already made by signing bills of lading differing from the charter (*x*).

But if without such authority he varies the contract on some point within his authority as master, if there were no charter, as the rate of freight (*y*), and the bill of lading is given to a shipper other than the charterer, and ignorant of the terms of the charter, or, being given to the charterer, comes into the hands of a *bonâ fide* holder for value (*y*), the owner, if he recognises the master's contract of carriage, must also recognise all the terms of it (*z*).

If, however, the variations are clearly beyond the ordinary authority of a master, as if the master contracts to carry goods freight free (*a*), or if he makes freight under the bill of lading payable to a third party other than the owner or his agent (*b*), or if he makes freight payable in advance to the charterers instead of at the port of discharge to his owners (*c*), or if he purports to certify the quality of the goods shipped (*d*), the owner will not be bound by the contract represented in the bill

(*u*) Such as "master to sign bills of lading as presented to him by charterers, without prejudice to the terms of the charter": for a discussion of this, see *Note 2*, p. 77, *post*.

(*x*) *Pickernell v. Jauberry* (1862), 3 F. & F. 217; *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67. For a curious case in which the master had authority as agent of necessity for the charterers, or if he had no authority they could claim no benefit from his action, see *Davis v. Staveley* (1921), 6 Ll. L. & R. 160.

(*y*) As in *Mitchell v. Scaife* (1815), 4 Camp. 298. Cf. *The Draupner*, (1909) P. 219; (1910) App. Cas. 450.

(*z*) *Mercantile Exchange Bank v. Gladstone* (1868), L. R. 3 Ex. 233, at p. 240.

(*a*) See note (*r*), p. 74, *ante*.

(*b*) *Reynolds v. Jex* (1865), 7 B. & S. 86. It is doubtful whether the master has authority to make advances to himself or ship a first charge or deduction from the freight payable under charter or bill of lading: *Gibbs v. Charleton* (1857), 26 L. J. Ex. 321.

(*c*) *The Canada* (1897), 13 T. L. R. 238.

(*d*) *Cox v. Bruce* (1886), 18 Q. B. D. at p. 152.

of lading to exist, even to a *bonâ fide* holder for value of such bills of lading (e).

Note 1.—*The ordinary authority of a master* has lessened very much in modern times (f). The electric telegraph has enabled the owner to perform much of the master's work in foreign ports. The system of printed bills of lading, and the extensive development of regular lines of steamers, with their accompanying agents and branches abroad, have converted the master into little more than the chief navigator of the ship. In the ports of loading and discharge he has commonly very little to do. On most steam lines the master has no authority to alter the printed bill of lading, or to fix the rate of freight, or to charter the ship, or to make engagements to carry goods in her; he may indeed sign bills of lading abroad, but his signature only acknowledges the quantity and external condition (g) of the goods shipped and the date of shipment (f). On such lines, therefore, the ordinary authority of a master in port is very small, and, though on the voyage the necessity of the case may confer on him considerable power (i), increased facilities of communication have much diminished the cases where, as he cannot communicate with his owners, such necessity arises. The law as stated, and the cases supporting it, must therefore be read subject to the proviso that the position of the master has materially altered of late years; the master has been superseded partly by the owner and partly by the broker, and the broker's or master's authority is usually strictly defined by the printed bill of lading.

(e) *Grant v. Norway, Reynolds v. Jex, Mercantile Bank v. Gladstone, vide supra.* In *Grant v. Norway*, signing a bill of lading for goods not on board is included under this head; but, though this is a contract beyond the master's authority, there is nothing on the face of the bill of lading to show that he has exceeded his authority; in the freight cases there is, and the unusual provision should at once suggest inquiry. It seems best therefore to rest the case of goods not on board, on the absence of any contract of carriage, of which the bill of lading might be evidence, or on the principle of acting at your peril in dealing with an agent known to have limited authority.

(f) For a statement of the "ordinary authority of a master" at that date, see *Grant v. Norway* (1851), 10 C. B. 665, at p. 687. As to the duty of a master to his owner, where a broker is employed, in which case he must still check the date and the fact of shipment of goods, see *Stumore v. Breen* (1886), 12 App. C. at p. 704.

(g) *Compania Vascongada v. Churchill*, (1906) 1 K. B. 237.

(i) See Section VII., *post*.

Note 2.—It is now common to provide that "the captain is to sign bills of lading [at any rate of freight] as presented by the charterer without prejudice to the charter." The authorities are not in a very satisfactory state as to the meaning of this clause. One view is that it is the duty of the charterer only to present bills of lading which do not vary the provisions of the charter; that if he does present bills which do vary them, the master may refuse to sign them, but that if he signs them, the charterer has broken his contract, and must make good to the shipowner any damages the latter sustains by reason of being made liable on such bills in excess of his liability under the charter (*k*). This appears to be the view taken by the House of Lords in *Kruger v. Moel Tryvan Ship Co.* (*l*), where the charter contained a negligence clause. The charterer presented, and the master signed, bills of lading containing the clause "all terms and conditions as per charter," under the impression that it incorporated the negligence clause. In consequence, the cargo having been lost by negligence of the master, *bona fide* indorsees of the bill of lading recovered damages against the shipowner, which he, in turn, recovered against the charterer, in the view of the House of Lords as damages for breach of contract to present bills of lading in accordance with the charter. Another view, however, can be taken, which would lead to the same result, *viz.* that the master is bound within certain limits (*m*) to sign any bill of lading presented by the charterer, but that the terms of the contract in the charter between the charterer and shipowner are not to be altered; and, consequently, if the signing of the bill of lading exposes the shipowner to greater liability than under the charter, the charterer must indemnify him. The former part of this view appears to be that taken by the Privy Council in *Turner v. Haji Goolam* (*n*), and by Lord Esher in *Hansen*

(*k*) As to the possibility, in the event of the charterer making out clean bills of lading as against mate's receipts not clean, of the shipowner obtaining indemnity from consequent claims by holders of the bills of lading, see *Leach v. Royal Mail Co.* (1910), 16 Com. Cas. 143.

(*l*) (1907) A. C. 272. In *Elder Dempster & Co. v. C. G. Dunn & Co.* (1909), 15 Com. C. 49, both Lord Loreburn and Lord Gorell approved a cause of action based on breach of warranty that bills of lading correctly stated marks; Lord Loreburn also approved a cause of action for indemnity based on request to sign the bills of lading.

(*m*) For instance, it is submitted he need not sign bills for goods he knows not to be on board, or with wrong dates of shipment or wrong marks.

(*n*) (1904) A. C. 826.

v. *Harrold* (o). The clause as to indemnity is frequently expressly inserted (p).

Where the clause contains the words, "at any rate of freight," the second meaning would clearly seem the correct one. It is submitted that the words "as presented" extend the power to vary, always without prejudice to the agreement in the charter between the parties.

If the terms of the bill of lading so presented deprive the shipowner of any effective lien, the charterer may be deprived of the protection of the cesser clause (q). Where it is the shipper's duty to present bills of lading, he must do so within a reasonable time after the cargo is loaded, although the ship is lost before he presents them (r). And when the cargo is loaded he must present the bill of lading in a reasonable time, even though the lay-days have not expired (s).

Note 3.—Charterparties now frequently contain a clause by which the charterer agrees to indemnify the owner from any consequences that may arise from the captain following the charterer's instructions and signing bills of lading. This clause has been held to cover a loss to the owner through the absence in the bill of lading of the negligence clause in the charter (t); but not to cover a liability to pay salvage on the goods carried under a bill of lading, because the master started with insufficient coal (u).

Case 1.—C. agreed with A. to ship oranges by A.'s ship at 4s. 6d. per box: E., A.'s master, then signed bills of lading for oranges shipped by C. at 3s. 6d. per box. *Held*, that C. was liable for freight at 4s. 6d. and was not relieved by the bill of lading (x). *Submitted*, that a *bonâ fide* holder for value of the

(o) (1894) 1 Q. B. 612.

(p) As in *Milburn v. Jamaica Fruit Co.*, (1900) 2 Q. B. 540, see *Note 3* below.

(q) *Hansen v. Harrold*, (1894) 1 Q. B. 612 (C. A.).

(r) *Oriental S.S. Co. v. Tylor*, (1893) 2 Q. B. 518 (C. A.). The master under such a clause must sign personally; his owner's signature will not do. *The Princess* (1894), 70 L. T. 388. But the clause imposing a fixed sum for each day's failure to sign is a penalty, and will not be enforced, beyond the actual amount of damage proved. *Jones v. Hough* (1879), 5 Ex. D. 115; *Rayner v. Condon*, (1895) 2 Q. B. 289; *The Princess* (1894), *vide supra*. See also Article 162.

(s) *Nolisement Co. v. Bunge*, (1917) 1 K. B. 160. The shipowner in respect of detention of his ship by delay in such presentation is entitled to recover damages for detention, and not merely to have relief from payment of despatch money. *Ibid*.

(t) *Milburn v. Jamaica Co.*, (1900) 2 Q. B. 540.

(u) *Park v. Duncan* (1898), 25 Sess. C., 4th Ser. 528 (Sc.).

(x) *Pickernell v. Jauberry* (1862), 3 F. & F. 217.

bill of lading would only have been liable for freight at 3s. 6d., the rate of freight being a matter within the master's ordinary authority (y).

Case 2.—A. chartered a ship to C., at a certain freight, "the owner or his agent to sign bills of lading at any rate of freight, without prejudice to this charter." D., C.'s agent abroad, advanced money to the ship, and in consideration of such advance the master shipped goods from D., giving a bill of lading "shipped by D., to be delivered to order or assigns, paying freight to D.'s agent G., as per margin." *Held*, that the master had no authority to make such a contract, and that A. was not bound by it to G., consignees of the cargo (z).

Case 3.—A. chartered a ship to C., "the master to sign bills of lading as presented without prejudice to the charter." C. shipped goods, and presented bills in the ordinary form, which the master refused to sign unless they contained the clause. "The vessel was not liable for duties on cargo, by non-arrival before July 1." *Held*, such refusal was a breach of the charter (a).

Case 4.—C. chartered a ship, "the master to sign bills of lading at any rate of freight, and as customary at a port of loading, without prejudice to the stipulations of the charter." The master signed and delivered to C. bills of lading including an exception not in the charter. *Held*, that he had no authority, by so doing, to vary the contract between shipper and charterer; and that the shipowner was not freed from liability for loss through such excepted peril (b).

Case 5.—Under a voyage charter it was provided that the captain should sign bills of lading at the current or any rate of freight without prejudice to the charter. The captain signed bills making the freight payable in advance at a port of loading to the charterers, not the owners. *Held*, that such a term was beyond the authority conferred on him (c).

Article 21.—Statutory Liability of Persons signing Bill of Lading.

In the hands of a consignee or indorsee for value (d) the bill of lading is by statute (e) conclusive evidence

(y) See *Mitchell v. Scaife* (1815), 4 Camp. 298.

(z) *Reynolds v. Jex* (1865), 7 B. & S. 86.

(a) *Jones v. Hough* (1879), 5 Ex. D. 115.

(b) *Meyer v. Dresser* (1864), 16 C. B. N. S. 646.

(c) *The Canada* (1897), 13 Times L. R. 238. If the clause had been to sign bills of lading as presented, *submitted* he would have been bound to sign them, though all freight was made payable in advance. *Janentzky v. Langridge* (1895), 1 Com. Cas. 90, and *cf. The Skillito* (1897), 3 Com. Cas. 44. See also *West Hartlepool Co. v. Tagart, Beaton & Co.* (1902), 18 T. L. R. 358; 8 Com. Cas. 133.

(d) *Bates v. Todd* (1831), 1 M. & R. 106.

(e) Bills of Lading Act, 1855, s. 3: see Appendix III., *post*.

that the goods represented (*f*) by it to be shipped were actually shipped, as against the persons signing it (*g*), unless either (1) the holder took the bill with actual notice that such goods were not on board; or, (2) the signer shows that the mistake was not occasioned by his default, but was wholly occasioned by the fraud of the shipper, holder, or some person under whom the holder claims (*h*).

Note.—The bill of lading is not conclusive as between the signer and the shipper, nor as between the owner and the shipper (*d*); nor as between owner and holder for value (*i*), unless the owner signs it himself or by a servant (*g*). Thus, where the master who signs is also part owner, and sues on the bill, the statute applies against him (*l*). But in all these cases the statements in the bill of lading are *prima*

(*f*) The representation does not extend to the marks of the goods inserted in the bill of lading when such marks are merely for identification, and do not represent quality or character of the goods. Thus where bills of lading in the hands of an indorsee were for a certain number of carcasses of meat marked 662x and 488x, and such carcasses were not on board, the shipowner was not estopped from shewing that a corresponding number that were on board, marked 522x and 388x, were in fact the carcasses represented by the bill of lading. *Parsons v. New Zealand S.S. Co.*, (1901) 1 K. B. 548. In the Court of Appeal, A. L. Smith, M.R., dissented from this view, but *held* that the shipowner was protected by a clause that he should not be responsible unless goods were "correctly marked." The difference of opinion turned on the question of fact whether the marks did or did not denote commercially the character or description of the goods, or were merely for identification.

(*g*) Formerly almost always the master, but now the broker usually signs bills for steamships: *Hayn v. Culliford* (1878), 3 C. P. D. 410. "The person signing" does not mean only the person who actually affixes the signature, but includes a person for whom a clerk or servant signs in a purely ministerial capacity, but not a person for whom an agent who has discretionary powers, such as a master or broker, signs: *Thorman v. Burt* (1886), 54 L. T. 349. For an action by indorsee against the master signing a bill of lading, see *Smith v. Tregarthen* (1887), 56 L. J. Q. B. 487. For an action by shipowner against master for negligence in signing a bill of lading, see *Stumore v. Breen* (1886), 12 App. Cas. 698.

(*h*) Bills of Lading Act, 1855, s. 3: see Appendix III., *post*. Mistake or negligence of the master, not fraudulent, will not enable the indorsee to sue if there has been fraud either of the shipper, his agent, or his vendor: *Valteri v. Boyland* (1866), L. R. 1 C. P. 382. See also *Pyman v. Burt* (1884), 1 C. & E. 207, where the master's signature was obtained by pressure of the shipper's clerk, the authority of which was doubted by Lord Esher in *Lishmann v. Christie* (1887), 19 Q. B. D. 333.

(*i*) *Meyer v. Dresser* (1864), 16 C. B. N. S. 646.

(*l*) *Meyer v. Dresser* (1864), 16 C. B. N. S. 646.

facie evidence, which the person disputing them must disprove (*m*). Master and broker obtain some protection from the clause "weight, value and contents unknown" (Article 52).

Case.—F. shipped on board A.'s ship seventy and seventy-five quarters of wheat, and received two bills of lading signed by E., A.'s master; F. indorsed these bills to I. F. then by fraud induced E. to sign another bill for 145 quarters, which he indorsed to H. Submitted (*n*), that H. would have had no action against E., if he had delivered wheat to I. under the first bill.

Article 22.—Through Bills of Lading.

A "through bill of lading" is one made for the carriage of goods from one place to another by several shipowners or railway companies.

The contract in such bill of lading to carry for the whole distance is one contract made with the company signing and delivering the bill of lading (*o*), and in the absence of express provisions that company would be liable for loss occurring on any part of the journey (*p*).

The freight also, if paid in advance, is usually payable for the whole journey, and, should the goods be lost on one of the stages, the shipper is not entitled to a *pro*

(*m*) *McLean v. Fleming* (1871), L. R. 2 Sc. App. 128; *Jessel v. Bath* (1867), L. R. 2 Ex. 267; *Grant v. Norway* (1851), 10 C. B. 665. See p. 71, *supra*.

(*n*) On authority of *Hubbersty v. Ward* (1853), 8 Ex. 330, which see.

(*o*) *G. W. R. v. Blake* (1862), 7 H. & N. 987; *Thomas v. Rhymney R. Co.* (1871), L. R. 6 Q. B. 266; *Bristol & Exeter Co. v. Collins* (1859), 7 H. L. C. 194; *Webber v. G. W. R.* (1865), 34 L. J. Ex. 170.

(*p*) Such an express provision usually exists; e.g., "when any of the several companies connected with the transit of the goods shall have delivered the goods or any of them, to any other carrier to be transported to their destination, its liability shall cease altogether, such company being liable only for such loss or damage as may occur while the goods are in its possession, and for which it is legally liable." On its effects, see *Fowles v. G. W. R.* (1852), 7 Ex. 699. See also, for condition as to loss after transshipment, *Allan v. James* (1897), 3 Com. Cas. 10. Where freight paid in advance is to be adjusted at port of discharge according to quantity delivered, it has been held that the last carrier is liable for the excess of freight for the whole journey, and not merely for his part of the journey: *Kitts v. Atlantic Transport Co.* (1902), 7 Com. Cases, 227.

rata return of the freight for other stages, as if the consideration had failed (*q*).

In recent times it has become a common practice for the through bill of lading to contain a provision incorporating "all conditions expressed in the regular forms of bill of lading in use by the Steamship Company" performing the ocean carriage. The contract under which the ocean carriage is performed is then to be collected from the terms of two documents, both, in most cases, of great complexity, and also, in most cases, of considerable obscurity (*r*).

Semble, that the companies other than the company which signs and delivers the bill of lading, are not liable and cannot sue (*s*) on the contract of carriage contained in such bill of lading, unless the signing company had authority to act in their behalf (*t*), or its action was afterwards ratified by them. But they will be liable as

(*q*) *Greeves v. West India Co.* (1870), 22 L. T. 615. The case is frequently expressly provided for by the clause, "freight to be considered earned, ship lost or not lost, at any stage of the entire transit."

(*r*) See, e.g., *E. Clemens Horst Co. v. Norfolk, &c. Co.* (1906), 11 Com. Cas. 141; *The Hibernian*, (1907) P. 277; *Crawford v. Allan Co.*, (1912) A. C. 130.

(*s*) *Leech v. Glynn* (1890), 6 T. L. R. 306. Where, however, with a through rate from the interior of America it was provided that "the inland proportion of the freight is due on delivery of the goods to the steamship, and the shipowner shall have a first lien on the goods in whole or part until payment thereof," and part of the goods was lost at sea, it was *held* that on delivery in London of the remaining goods the shipowner could claim the full rate on the goods delivered and also the inland proportion on the goods not delivered: *The Hibernian*, (1907) P. 277.

(*t*) Such authority must be a question of fact in each case. It will not be proved by a statement in the bill of lading that the signing company signs as their agent, though such statement, if false, may subject the signing company to an action for breach of warranty of authority. The companies concerned will probably always acknowledge the through bill of lading, and claim its protection. See as to this an instructive article by Mr. H. D. Bateson, in the *Law Quarterly Review*, October, 1889, p. 424, which raises the further points:—(1) Whether a Through Bill of Lading is a Bill of Lading within the Bills of Lading Act, 1855, so that its indorsement passes contractual rights to the indorsee; (2) the absence in the Through Bill of Lading of any evidence of shipment on a ship at an intermediate stage of the voyage; (3) by what law or laws the different parts of the transit are regulated. For discussion of a through bill of lading for sea and land carriage, see *Moore v. Harris* (1876), L. R. 1 App. C. 318.

carriers for goods shipped on board their ships, or to an action of tort for negligent dealings with such goods (u).

Who may sue and be sued for negligent carriage of goods: see Articles 92, 93.

Who may sue in rem, under the Administration of Justice Act, 1920: see Article 77.

Who may sue and be sued for freight: see Articles 147, 148.

Who may sue and be sued for general average contributions: see Articles 118, 119.

Who may sue and be sued for demurrage: see Articles 134, 135.

(u) *Self v. L. B. & S. C. R.* (1880), 42 L. T. 173; *Foulkes v. M. D. R. Co.* (1879), 5 C. P. D. 157. As to the liability in tort of a lighterman to the owner of goods carried by the lighterman for part of the transit covered by the through bill of lading, see *The Ternagant* (1914), 19 Com. Cas. 239.

SECTION III.

REPRESENTATIONS AND UNDERTAKINGS IN THE CONTRACT.

Article 23.—Representations and Conditions Precedent.

REPRESENTATIONS inducing the signing of a charter are either:—

- (1) embodied in the charterparty; or
- (2) not embodied in the charterparty.

False representations not embodied in the charter may be material in civil cases, either as estopping the party making them from denying their truth, or as rendering the contract voidable at the instance of the party relying on them (a). If they are fraudulent (b), they will also give rise to an action in tort of deceit against the party making them.

Statements embodied in the charter are either of facts as then existing, as of the then position of the ship, or

(a) Where a written agreement is conditional on some oral representation or agreement, the oral term may be enforced as a condition precedent, or as a term of the contract, breach of which gives rise to an action for damages. Cf. *De Lassalle v. Guildford*, (1901) 2 K. B. 215; *Bannerman v. White* (1861), 10 C. B. N. S. 857; *Morgan v. Griffith* (1870), L. R. 6 Ex. 70; *Angell v. Duke* (1875), L. R. 10 Q. B. 174. (See, however, the judgments of Lord Haldane, L.C., and Lord Moulton in *Heilbut Symons v. Buckleton*, (1913) A. C. 30.) Thus where a charter is entered into on faith of an oral statement as to draught of the ship, damages have been obtained, in an unreported case, for its untruth. See also *Hassan v. Runciman* (1904), 10 Com. Cas. 19, where damages were recovered for the breach of a collateral oral warranty as to the steamer's cargo capacity. For an instance of the rescission of a charterparty by reason of an innocent misrepresentation by the shipowner, see *Compagnie Paris Orleans v. Leeston Co.* (1919), 36 T. L. R. 68.

(b) For a full discussion of the different effects of Misrepresentation and Fraud, see Pollock on Contracts, 9th ed., pp. 565 *et seq.* For an authoritative definition of "fraud," see *Derry v. Peek* (1889), 14 App. C., *per* Lord Herschell, at p. 374. "Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it is true or false."

of her class on the register; or are promises for the future, as that a ship will be ready to load by a given day.

Such statements are either:—

I. *Conditions Precedent*, to be regarded as essential parts of the contract, which is conditional on their truth. Their breach therefore entitles the other party to repudiate the charter, or:—

II. *Terms of the Contract*, which one party has promised to be true. Their breach only gives rise to an action for damages, for their truth is not of such importance to the contract that their falsehood should destroy the ground of agreement between the parties (*c*).

The breach of a condition precedent being waived by one party in so far that he does not repudiate the contract converts the condition precedent into a simple term of the contract, its breach giving an action for damages (*d*).

If the party claiming to repudiate for breach of a condition precedent has already after knowledge of the breach received substantial benefit under the contract, for which he will give no equivalent if he is allowed to repudiate the contract, he will not be entitled to repudiate, but will only have an action for damages (*e*).

It is for the Court to determine whether a statement is a condition precedent, the jury finding the surrounding

(*c*) *Behn v. Burness* (1863), 3 B. & S. 751. (Ex. Ch.). See also *per* Bowen, L.J., in *Bentsen v. Taylor*, (1893) 2 Q. B. at p. 280.

(*d*) *Bentsen v. Taylor*, (1893) 2 Q. B. 274 (C. A.); *Engman v. Palgrave* (1899), 4 Com. Cases, 75. Where payment of freight on a given day is made a term of the charter, with an express provision allowing the owner to withdraw the steamer if it is not paid, neither failure to demand the freight before withdrawal, nor giving additional time to pay, are evidence of waiver of the right to withdraw: *Tyrer v. Hessler* (1902), 7 Com. Cases, 166 (C. A.). See *infra*, p. 397.

(*e*) *Behn v. Burness* (1863), 3 B. & S. 751; *Ohlsen v. Drummond* (1785), 4 Dougl. 356; *Havelock v. Geddes* (1809), 10 East, 555; *Graves v. Legg* (1854), 9 Ex. 709, 716; *Pust v. Dowie* (1864), 5 B. & S. 20; *McAndrew v. Chapple* (1866), L. R. 1 C. P. 643; *Bentsen v. Taylor*, (1893) 2 Q. B. 274.

circumstances, from which the intention of the parties to the charter can be inferred (*f*).

Note.—It is unusual to have any dispute about conditions precedent to a bill of lading: (1) because such disputes usually arise when the ship has sailed, and the shipper has no opportunity of reclaiming his goods; and (2) because statements in a bill of lading are rarely important to original shippers. It is submitted that the description of the vessel in the bill of lading and any statement as to her destination or route (*g*), probably also any statement as to her date of sailing on shipping cards, are, if insisted upon, conditions precedent, and that substantial inaccuracies in these matters, if discovered before the ship sails, would entitle the shipper to require his goods back, free of freight and expenses (*h*).

Case 1.—A ship was chartered on October 19 as “the *S.* now in the port of Amsterdam . . . should with all possible dispatch proceed to Newport and there load.” On October 15 the *S.* was at Nieuwediep, 62 miles from Amsterdam, and could have arrived there in twelve hours; but, owing to contrary winds and absence of steam-power, she did not arrive at Amsterdam till the 23rd.

(*f*) *Behn v. Burness* (Case 1, below); *Oppenheim v. Frazer* (1876), 34 L. T. 524. See *Comptoir Commercial v. Power*, (1920) 1 K. B. 868.

(*g*) Thus in *Leduc v. Ward* (1888), 20 Q. B. D. 475, a statement in a bill of lading that the ship *S.* was now at X. and bound for Z., was held to contain a contract that the *S.* would proceed from X. to Z. by the ordinary route. *Semble*, that if a shipper under such a bill of lading had subsequently and before sailing discovered the shipowner's intention to proceed by another and longer route, he could have demanded his goods back on failure of a condition precedent. See *Peel v. Price* (1815), 4 Camp. 243, where the shipowner, after delivering a card giving destination Z. by way of Y., subsequently altered it to Y. by way of Z., and it was held that he was bound to give specific notice of the alteration to each shipper under the first card. In *Armstrong v. Allan* (1892), 8 T. L. R. 613, the clause in a shipping note “no goods to be received on board unless a clean receipt can be given,” was treated as a condition precedent, the breach of which entitled the shipper to demand his goods back.

(*h*) In *Frazer v. Telegraph Co.* (1872), L. R. 7 Q. B. 566, a statement in the bill of lading, “shipped on board the steamship *S.*, from X. to Z.,” was held to constitute a contract that the goods should be carried by a vessel whose principal motive power was steam: the ship was a sailing vessel with an auxiliary screw, and made the voyage entirely under sail. *Held*, that the contract was broken. *Semble*, that if the shipper had discovered the character of the ship and her intended mode of progress after he shipped the goods, but before she sailed, he could have demanded his goods back, free from freight and expenses, on failure of a condition precedent.

She discharged as quickly as possible, and reached Newport on December 1. The charterers refused to load. *Held*, that it was for the judge to construe this contract and decide as to the materiality of its statements, being influenced not only by its language, but also by the circumstances under which, and the purposes for which, it was entered into, which circumstances and purposes were to be found by the jury. That in this case the evidence shewed that the time of the ship's arrival to load was an essential fact for the charterer to know, and that the position of the ship at the time of entering into the charter was the only *datum* from which the charterer could calculate the time of the ship's arrival. That the truth of the words "now in the port of A." was, therefore, a condition precedent to the obligation of the charter, and their untruth entitled the charterer to repudiate it (i).

Case 2.—A contract was made for the sale of such rice as may arrive by the ship *S.* "now at Rangoon." The ship was not then at Rangoon, and the buyers repudiated the contract. *Held*, that evidence that the presence of ship and cargo at Rangoon was of vital importance to the parties, as the prohibition of the export of rice from Rangoon was expected in consequence of famine in India, was admissible. *Per* Blackburn, J.: "It is never a fact to go to the jury what the words of a contract mean, but it is a fact to go to them under what circumstances are they made, and to what do they relate?" and the contract must be construed by the judge in connection with the findings of the jury on these points (k).

Case 3.—A ship was chartered for twelve months certain, from December 24; and the owner covenanted that the ship should be at his expense forthwith made seaworthy for a voyage of twelve months and kept seaworthy during the voyage. She was not in fact seaworthy, but the charterer employed her for several months. *Held*, that under the circumstances seaworthiness was not a condition precedent to the payment of freight (l).

Case 4.—A ship was chartered at a freight of £1,500, on condition of her taking a cargo of not less than 1000 tons of weight and measurement; she could not carry such a cargo; but the charterers loaded a cargo and the ship sailed with it. *Held*, that even if the condition was broken, it was only under the circumstances a ground for damages and not a condition precedent (m).

Case 5.—A ship was chartered to proceed to a safe port near Cape Town. The charterer did not name a port, but offered to send a supercargo with the ship to do so. *Held*, that his naming a

(i) *Behn v. Burness* (1863), 3 B. & S. 751. *Cf.* *Ashmore v. Cox*, (1899) 1 Q. B. 436.

(k) *Oppenheim v. Frazer* (1876), 34 L. T. 524. See also *Gorissen v. Perrin* (1857), 2 C. B. N. S. 681.

(l) *Havelock v. Geddes* (1809), 10 East, 555.

(m) *Pust v. Dowie* (1864), 5 B. & S. 20.

port was a condition precedent to the obligation of the shipowner to commence the voyage (*n*).

Case 6.—A ship was chartered to be ready on or before November 10, or charterers to have the option of cancelling the agreement. *Held*, that such readiness was a condition precedent to the charter.

The charter also contained a clause that the captain should attend daily at the broker's office to sign bills of lading. *Held*, that such a daily attendance was not a condition precedent to the right to sue under the charter (*o*).

Case 7.—In negotiating a charter, the owner's agent orally represented that the ship had carried 1367 tons of cargo. Relying on this, the charterers agreed to pay £1000, lump freight. The charter contained no warranty as to capacity. In fact, the ship's full cargo could not exceed about 1000 tons. *Held*, that the charterers could recover damages for breach of a collateral oral warranty (*p*).

Article 24.—Ship's Class on the Register.

A statement in the charter of the ship's class on the register amounts only to a condition precedent that the ship at the time of making the charter is actually so classed (*q*) and not that she is rightly so classed (*r*), or that she will continue to be so classed during the term of the charterparty (*s*).

Case 1.—A ship was chartered as the "A 1 British brig, *S.* of Liverpool." *Held*, a condition precedent to the charter that at the time of its making the ship was classed A 1* at Lloyd's (*q*).

Case 2.—On September 4, a ship was chartered as "A 1½ Record of American and Foreign Shipping Book . . . the ship *S* newly classed as above." At that date the statement was correct. On November 13 she arrived at New Orleans to receive her cargo, and on November 25 her classification was cancelled for unseaworthiness (*t*). *Held*, that the statement was only a warranty of

(*n*) *Rae v. Hackett* (1844), 12 M. & W. 724. See also *Ohlsen v. Drummond* (1785), 4 Dougl. 356; *Bradford v. Williams* (1872), L. R. 7 Ex. 259.

(*o*) *Seeger v. Duthie* (1860), 8 C. B. N. S. 45.

(*p*) *Kassan v. Runciman* (1904), 10 Com. Cas. 19.

(*q*) *Routh v. Macmillan* (1863), 2 H. & C. 750.

(*r*) *French v. Newgass* (1878), 3 C. P. D. 163.

(*s*) *Hurst v. Osborne* (1856), 18 C. B. 144, approved in *French v. Newgass*, *vide supra*.

(*t*) The charterer could throw up the charter for unseaworthiness, if it could not be remedied within a reasonable time. See Article 29, *post*. *Hurst v. Osborne* (1856), 18 C. B. 144, approved in *French v. Newgass*, *vide supra*.

the ship's being so classed at the making of the charter, and was not a continuing warranty of her being rightly in such class, or remaining so classed (*r*).

Case 3.—A ship was chartered as "the good *S. A. 1.*" During her voyage she ran off her letter. *Held*, to amount to a warranty of her class at Lloyd's at the time of her charter, but not to a warranty that she should continue of that class during the charter, or that the owners would omit no act necessary to retain her in that class (*s*).

Article 25.—Ship's Tonnage, or Dead Weight Capacity.

A variation from the ship's tonnage as named in the charter will not be a breach of a condition precedent, unless the jury find the difference unreasonably great, or such as to be of material importance to the contract (*u*).

Where a charter contains a guarantee that a ship shall or can carry a certain number of tons dead weight, or is of a certain dead weight capacity, this, in the absence of indications to the contrary, is a guarantee of the abstract carrying capacity of the ship, without reference to any particular cargo proposed to be shipped (*x*).

Where, however, the guarantee, on its proper construction, has reference to a cargo of a particular description proposed, and made known to the owner as, to be shipped on the contemplated voyage, the guarantee will relate to the capacity to carry that description of cargo (*y*).

(*u*) So held in *Barker v. Windle* (1856), 6 E. & B. 675, where the chartered tonnage was from 180 to 200 tons, the actual tonnage 258 tons; and *Gibbs v. Grey* (1857), 2 H. & N. 22, where the difference was between 470 and 350 tons. See Article 46, *post*. In *Harrison v. Knowles*, (1917) 2 K. B. 606, it was held, on a contract for the sale of a ship, that the difference between 460 and 360 tons d.w.c. was a difference of degree and not of kind, and therefore did not constitute a breach of a condition. *Sed quare*, and see S. C. in C. A., (1918) 1 K. B. 608.

(*x*) *Millar v. Freden*, (1918) 1 K. B. 611; *Thomson v. Brocklebank*, (1918) 1 K. B. 655; cf. *Carnegie v. Conner* (1889), 24 Q. B. D. 45, and *Societa Ungherese v. Tyser Line* (1902), 8 Com. Cas. 25.

(*y*) *Mackill v. Wright* (1888), 14 App. C. 106, *per* Lord Macnaghten at p. 120, Lord Watson at pp. 116, 117, Lord Halsbury at pp. 114, 115. See also *Potter v. New Zealand Shipping Co.* (1895), 1 Com. Cases, 114.

Case 1.—A ship was chartered to carry all such goods as the charterers should send alongside; “owners guarantee that the vessel shall carry not less than 2000 tons dead weight. Should the vessel not carry the guaranteed dead weight as above . . . a *pro rata* reduction per ton to be made from the first payment of freight.” The cargo intended to be carried was a general cargo, in part composed of machinery, and there was a marginal note on the charter, specifying the numbers and measurements of the largest pieces of machinery. The ship was in fact of a carrying capacity of 2000 tons dead weight; the charterers tendered a cargo of less than 2000 tons weight, but which largely exceeded 2000 tons weight and measurement, and which included more large pieces of machinery than were specified in the marginal note. The vessel in fact sailed with only 1691 tons weight on board.

Held, that as the cargo was not that contemplated in the charter, and the cause of the vessel’s not carrying 2000 tons dead weight was attributable to the charterers, they were not entitled to any deduction from the freight (*z*).

Case 2.—A printed form of charterparty provided that the ship should carry a full and complete cargo of maize. There was also a clause, “The owners guarantee the ship’s dead-weight capacity to be 3200 tons, and freight to be paid on this quantity.” The ship could load a dead weight of 3200 tons, *e.g.* with a cargo of coal, but she could not carry more than 3081 tons of maize. *Held*, that there was no breach of the guarantee (*a*).

Note.—The term “tonnage” refers to register tons of 100 cubic feet, and has no reference to weight.

The term “tons” by itself would mean a weight of 20 cwt., but the full phrase “ton of 20 cwt.” is generally used. For payment of freight the ton is sometimes calculated at some specified number of cwt. less than twenty.

The term “tons weight or measurement” means that goods shipped are to be taken either by weight of 20 cwt., or by measurement of 40 cubic feet, a measure probably derived from the measure of 20 cwt. of salt water (=35.7 cubic feet, the balance being the allowance for the hull carrying it). Whether goods are to be treated as weight or measurement goods for freight, is at the option of the ship-owner. See, for the meaning of the phrase in a charter, *Pust v. Dowie* (*b*).

(*z*) *Mackill v. Wright* (1888), 14 App. C. 106.

(*a*) *Millar v. Freden*, (1918) 1 K. B. 611 (C. A.). *Sed quære*, where the cargo is specified in the charter.—T. E. S.

(*b*) *Pust v. Dowie* (1864), 5 B. & S. 20.

The number of tons of 20 cwt. a vessel will lift is called her "dead weight capacity," for short, "dead weight," "d. w.," or "capacity." "Capacity" is also applied to the "room" or number of cubic feet available for stowage in the holds of a ship, which may differ materially from the weight she can lift without putting her Plimsoll mark or load-line under water.

The primary meaning of "dead weight" appears to be simply "weight"; it has, however, acquired a secondary meaning as applied to goods which measure less than 40 cubic feet per ton weight, and therefore pay freight by weight. But it is submitted that "dead weight" may include goods, measuring more than 40 cubic feet per ton, which certainly have a weight, and that it is only not usually applied to them, because for freight-paying purposes this weight is immaterial.

In the first eight editions of this work it was stated, upon the authority of *Mackill v. Wright* (c), that the rule, as regards a guarantee of dead weight capacity, is that it is a guarantee of capacity for the proposed cargo, and the exception that it is a guarantee of abstract cargo capacity. There are certainly *dicta* in the opinions in the House of Lord (*e.g. per* Lord Macnaghten at p. 120) which support that view. In view, however, of the decisions in *Millar v. Freden* (d) and *Thomson v. Brocklebank* (e) it would appear that *Mackill v. Wright* (c) is to be treated as an exceptional case turning on the special terms of the charter, and that in the absence of such special terms the rule, as in *Carnegie v. O'nnner* (f), that the guarantee is only of the abstract lifting capacity, will prevail. [*Quære*, where the intended cargo is specified in the charter, as it was in *Millar v. Freden* (g).—T. E. S.]

Article 26.—Ship's Name and National Character.

Substantial accuracy in the name of the vessel will be a condition precedent.

(c) (1888), 14 A. C. 106.

(d) (1918), 1 K. B. 611.

(e) (1918), 1 K. B. 655.

(f) (1889), 24 Q. B. D. 45. It is to be noted, however, that in that case, which was decided on 25th October, 1889, *Mackill v. Wright*, decided in the previous year and reported in the preceding August, was apparently not cited.

(g) (1918), 1 K. B. 611.

The national character of the vessel as stated in the charter may be a condition precedent; *e.g.*, in time of war, when neutrality is an important circumstance (*h*). But a warranty of national character cannot be inferred from the mere name of the ship, and has been held, in policies of insurance, only to refer to the time of the execution of the policy, and not to be a warranty continuing during the currency of the policy (*i*).

If a ship when chartered is in fact of a certain nationality it will be a breach of the charterparty by the owner if during its currency he changes her flag, *e.g.*, by selling her to an owner of another nationality (*j*). Damages for such breach may only be nominal, but in some circumstances may be substantial (*j*).

Article 27.—Whereabouts of Ship and Time of Sailing.

A statement that the ship is in a certain position at the time of making the charter (*k*), or that she will be at a certain place by a certain day (*l*), or that she will be ready to receive cargo by a certain day (*m*), or that she will sail on her voyage by a certain day (*n*), is usually a condition precedent to obligations under the charter. The fact that the breach of such a condition precedent

(*h*) *Behn v. Burness* (1863), 3 B. & S. 751, at p. 757. During the Spanish-American War in 1898, lay arbitrators under a charter to nominate a first-class steamer held that a tender of a Spanish steamer was a bad tender, on the ground that, being liable to capture, she was not fit to carry the cargo. The C. A. declined to order a special case to be stated. *Hoyland v. Ralli*, October 29th, 1898.

(*i*) *Arnould on Insurance*, 10th ed., sect. 656; *Baring v. Christie* (1804), 5 East, 398; *Dent v. Smith* (1868), L. R. 4 Q. B. 414. See *Marine Insurance Act*, 1906, s. 37.

(*j*) *Isaacs v. McAllum*, (1921) 3 K. B. 377.

(*k*) *Behn v. Burness* (1863), 3 B. & S. 751; *Ollive v. Booker* (1847), 1 Ex. 416; *Oppenheim v. Frazer* (1876), 34 L. T. 524.

(*l*) *Corkling v. Massey* (1873), L. R. 8 C. P. 395. See, however, *Associated Portland Cement Co. v. Houlder* (1917), 22 Com. Cas. 279.

(*m*) *Oliver v. Fielden* (1849), 4 Ex. Ch. 135; *Seeger v. Duthie* (1860), 8 C. B. N. S. 45; *Shadforth v. Higgin* (1813), 3 Camp. 385.

(*n*) *Glaholm v. Hays* (1841), 2 M. & G. 257; *Van Baggen v. Baines* (1854), 9 Ex. 523; *Deffell v. Brocklebank* (1817), 4 Price, 36; *Bentsen v. Taylor*, (1893) 2 Q. B. 274.

results from perils excepted in the charter will not prevent its being a condition precedent (o).

A statement that a ship will proceed or sail or load with all convenient speed is not a condition precedent, unless the delay frustrates the commercial purpose of the voyage (p).

Case 1.—Behn v. Burness (q).

Case 2.—A ship, on March 29, was described in the charter as "now sailed or about to sail." She did not in fact sail till April 23. *Held*, that the statement was a condition precedent, and was broken (r).

Case 3.—A ship was chartered "now at sea, having sailed three weeks ago," to sail to X. and there load a cargo. The ship had not in fact "sailed three weeks ago." *Held*, the statement was a condition precedent, and its breach entitled the charterer to throw up the charter (s).

Case 4.—A ship was chartered "expected to be at X. about the 15th December . . . shall with all convenient speed sail to X." The ship was in fact then on such a voyage that she could not complete it and be at X. by December 15. *Submitted*, that the charterer was entitled to throw up the charter (t).

(o) *Smith v. Dart* (1884), 14 Q. B. D. 105; *Groockewit v. Fletcher* (1857), 1 H. & N. 893. *Cf. Nickoll v. Ashton Edridge*, (1901) 2 K. B. 126 (C. A.).

(p) *Dimech v. Corlett* (1858), 12 Moore, P. C. 199; *Tarrabochia v. Hickie* (1856), 1 H. & N. 183; *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643; *Clipsham v. Vertue* (1843), 5 Q. B. 265; *Forest Oak v. Richard* (1899), 5 Com. Cases, 100. And see Article 90, *post*. The common "cancelling clause," by which the charterer has the option of cancelling the charter if the ship is not ready to load by a certain day, appears to go no further than a clause "ready to load by" a certain date, compliance with which would be a condition precedent. The "cancelling clause" may be so strict as to give neither party an option, as in *Adamson v. Newcastle Association* (1879), 4 Q. B. D. 462.

(q) *Vide ante*, Article 23, Case 1, p. 86; (1863), 3 B. & S. 751. *Behn v. Burness* (1863), came before the Exchequer Chamber as a test case to decide whether *Ollive v. Booker* (1847), and *Glaholm v. Hays* (1841), or *Dimech v. Corlett* (1858), were good law, assuming them to contradict each other. The Court held both to be good law, treating *Dimech v. Corlett* as the application of *Ollive v. Booker* to a set of very special facts. *Sharp v. Gibbs* (1857), 1 H. & N. 801, also turns on very special facts.

(r) *Bentsen v. Taylor*, (1893) 2 Q. B. 274 (C. A.). *Cf. Engman v. Palgrave* (1898), 4 Com. Cases, 75; on words "now in Finland, bound to London."

(s) *Ollive v. Booker* (1847), 1 Exch. 416.

(t) See *Corkling v. Massey* (1873), L. R. 8 C. P. 395. The words "expected ready to load late September" mean that in view of the facts known to the promisor when making his contract he honestly expects that the vessel will be ready as stated, and that his expectation

Case 5.—A ship was chartered in March “now on the stocks, and ready to receive cargo in all May.” *Held*, a condition precedent (*u*).

Case 6.—A ship was chartered “to proceed to X., the vessel to sail from Y. on or before the 4th of February.” *Held*, a condition precedent (*u*).

Case 7.—Charter to proceed to X., “and on arrival there to load and to sail with June convoy, provided she arrived out and was ready to load sixty-five running days previous to the sailing of such convoy.” The ship was not ready to load sixty-five days before the June convoy. *Held*, the breach only absolved her from sailing with the June convoy, and did not free her altogether from her obligation to load and proceed (*x*).

Case 8.—A ship was chartered to proceed to X. and there “load . . . the act of God and perils of the sea during the said voyage always excepted; should the steamer not be arrived at X. free of pratique and ready to load on or before December 15, the charterers to have the option of cancelling or confirming the charter.” Through dangers of the sea, the steamer, though at X., was not free of pratique by December 15, and the charterers cancelled. *Held*, that the clause as to excepted perils did not prevent them from so doing (*y*).

Case 9.—A ship was chartered on February 24, from X. to Y. and thence to Z. The charter described her as (1) coppered A 1 of X.; (2) now at anchor in this port, and contained a clause (3) that she should “proceed with all convenient speed.” At the execution of the charter, the ship (1) was not coppered and had no class on the register; (2) was not at anchor in the port as she was then being coppered as a new vessel in dry dock; and (3) did not leave X. till March 30. The charterer was at X. and knew of the delay, but did not repudiate the charter. *Held*, (1) that “A 1 coppered” referred to the date of sailing and not to the date of the charter (*z*). (2) That “now at anchor in the port” was too unimportant to be made a condition precedent, unless it could be shown that the object of the charter had been

is based on reasonable grounds. The promise or warranty is broken if either he does not honestly expect, or if he has not reasonable grounds for, his expectation. *Sanday v. Keighley Maxted & Co.* (1922), 27 Com. Cas. 296.

(*u*) *Oliver v. Fielden* (1849), 4 Exch. 135. For meaning of “leave not later than all March,” see *Van Baggen v. Baines* (1854), 9 Ex. 523.

(*v*) *Glaholm v. Hays* (1841), 2 M. & G. 259.

(*x*) *Deffell v. Brocklebank* (1817), 4 Price, 36. See also *Davidson v. Gwynne* (1810), 12 East, 381; *Kidston v. Monceau* (1902), 7 Com. Cases. 82.

(*y*) *Smith v. Dart* (1884), 14 Q. B. D. 105. See also *Croockewit v. Fletcher* (1857), 1 H. & N. 893. The excepted perils would protect the shipowner from an action by the charterer.

(*z*) No opinion was expressed as to whether it was a condition precedent. The class on the register would certainly be so: whether “coppering” was so or not would probably depend on the nature and length of the voyage.

frustrated by its untruth. (3) That the term "to sail with all convenient speed," though undoubtedly broken, could not be treated as a condition precedent (a), since the charterer knew of its breach and did not throw up the charter (b).

Case 10.—A ship was chartered on March 15, the charter reciting that it was executed on February 6, and containing the clause "that the ship should proceed from X., where she then lay, on or before February 12." *Held*, if the clause had been possible to have been performed at the time of execution, it was a condition precedent; but here, when the charter was executed, the stipulation had become impossible and therefore nugatory and was not a condition precedent (c).

Article 28.—Conditions implied in the Contract.

In all contracts for the carriage of goods by sea, there are implied, in the absence of express stipulation to the contrary, the following undertakings by the shipowner or carrier:—

- (1) That his ship is seaworthy (d).
- (2) That his ship shall commence and carry out the voyage contracted for with reasonable diligence (e).
- (3) That his ship shall carry out the voyage contracted for without unnecessary deviation (f).

Such breaches of these undertakings as defeat the commercial purpose of the voyage will justify the hirer of

(a) It would have been otherwise had there been a named day: *Ollive v. Booker*; *Glaholm v. Hays*, *vide supra*; or if the delay had frustrated the commercial adventure: *Freeman v. Taylor* (1831), 8 Bing. 124. And see Article 30, *post*.

(b) *Dimech v. Corlett* (1858), 12 Moore, P. C. 199. Commented on in *Behn v. Burness* (1863), 3 B. & S. 751, 760; *cf. Bentzen v. Taylor*, (1893), 2 Q. B. 274. Mere delay in exercising it does not waive a right to withdraw for non-payment of freight by a named day: *Tyrer v. Hessler* (1902), 7 Com. Cases, 136.

(c) *Hall v. Cazenove* (1804), 4 East, 477. See also *Dixon v. Heriot* (1862), 2 F. & F. 760; but *contra per* Parke, B., in *Ollive v. Booker* (1847), 1 Exch. 416. "The averment of the fact that the charterer knew of the inaccuracy of the charter at the time of signing it was immaterial."

(d) *Steel v. State Line S.S. Co.* (1877), L. R. 3 App. C. 72, *et vide* Article 29.

(e) *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643, *et vide* Article 30.

(f) *Scaramanga v. Stamp* (1880), 5 C. P. D. 295, *et vide* Articles 99, 100.

the ship or the owner of the goods carried, in repudiating the contract to carry (*g*). Such breaches as do not defeat the commercial purpose of the voyage will give rise to an action for damages (*h*). The exceptions in a charter or bill of lading do not prevent the application of any of these undertakings, unless they are clearly intended so to do (*i*).

Article 29.—Undertaking of Seaworthiness.

A shipowner by contracting to carry goods in a ship, in the absence of express stipulation (*k*), impliedly undertakes that his ship is seaworthy (*l*).

This implied undertaking arises not from the shipowner's position as a common carrier, but from his acting as a shipowner (*m*).

The seaworthiness required is relative to the nature of

(*g*) *Cf. Freeman v. Taylor* (1831), 8 Bing. 124. The contract may be dissolved by delay which is not caused by any breach of contract by the shipowner. But this arises under a different principle applying to the law of contract generally. See Article 30 and Note 1 thereunder on "Frustration of Adventure."

(*h*) *Cliphsham v. Vertue* (1843), 5 Q. B. 265; *Tarrabochia v. Hickie* (1856), 1 H. & N. 183; *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643.

(*i*) *The Glenfruin* (1885), 10 P. D. 103; *Smith v. Dart* (1884), 14 Q. B. D. 105; *Gilroy v. Price*, (1893) A. C. 56; *Seville v. Colvils & Co.* (1888), 15 Sc. Sess. C., 4th Ser. 616, *cf.* on facts with *Cunningham v. Colvils* (1888), 16 Sc. Sess. C., 4th Ser. 295; *The Waikato*, (1899) 1 Q. B. 56 (C. A.).

(*k*) An exception or stipulation to absolve the shipowner from the undertaking of seaworthiness must do so in clear and express words and without ambiguity: *Rathbone v. Melver*, (1903) 2 K. B. 378; *Elderslie v. Borthwick*, (1905) A. C. 93; *Nelson v. Nelson*, (1908) A. C. 16, as explained by Lord Macnaghten in *Chartered Bank v. British India Steam Navigation Co.*, (1909) A. C. at p. 375.*

(*l*) *Steel v. State Line Steamship Co.* (1877), 3 App. C. 72; *The Marathon* (1879), 40 L. T. 163; *Cohn v. Davidson* (1877), 2 Q. B. D. 455; *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377; *Lyon v. Mells* (1804), 5 East, 428. As to the implied warranty in a towage contract that the tug is fit and efficient see *The Marechal Suchet*, (1911) P. 1, and *The West Cock* (1911), p. 23. A tug-owner also impliedly contracts that his tug is properly equipped and supplied with coals: *The Undaunted* (1886), 11 P. D. 46. But see *Robertson v. Amazon Tug Co.* (1881), 7 Q. B. D. 598, negating an implied contract of efficiency, where the tug is named; the facts there, however, were very unusual.

(*m*) *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377.

the ship (*n*), to the particular voyage contracted for, and the particular stages of that voyage, being different for summer or for winter voyages, for river and lake, or for sea navigation (*o*), whilst loading in harbour, and when sailing (*p*), and varies with the particular cargo contracted to be carried (*q*). The stages of a voyage for this purpose are usually marked by different physical conditions; *e.g.*, river and sea. But in the case of the coal necessary for a steamer's long ocean voyage, such stages may be marked by the coaling ports only, the physical conditions of the voyage being similar throughout all the stages (*r*).

The undertaking is not merely that the shipowner will do and has done his best to make the ship fit, but that the ship really is fit in all respects to carry her cargo safely to its destination, having regard to the ordinary perils to which such a cargo would be exposed on such a voyage (*s*).

- (*n*) *Burges v. Wickham* (1863), 3 B. & S. 669.
 (*o*) *Thin v. Richards*, (1892) 2 Q. B. 141; *Daniels v. Harris* (1874), L. R. 10 C. P. 1; *Annen v. Woodman* (1810), 3 Taunt. 299.
 (*p*) *McFadden v. Blue Star Line*, (1905) 1 K. B. 697.
 (*q*) *Stanton v. Richardson* (1875), L. R. 9 C. P. 390; *Tattersall v. National Steamship Co.* (1884), 12 Q. B. D. 297; *The Marathon* (1879), 40 L. T. 163; *Maori King v. Hughes*, (1895) 2 Q. B. 550 (C. A.) (refrigerating machinery); *Queensland Bank v. P. & O. Co.*, (1898) 1 Q. B. 567 (C. A.) (bullion in a bullion room); *The Waikato*, (1899) 1 Q. B. 56 (C. A.) (wool in an insulated hold). See also *Rathbone v. McIver*, (1903) 2 K. B. 378.
 (*r*) *The Vortigern*, (1899) P. 140; following *Thin v. Richards*, (1892) 2 Q. B. 141. The case seems to extend the doctrine of "stages," beyond its application in any previous case. It is not clear whether the "stages" are to be fixed by the ports at which steamers can, or usually do, coal; or by the intentions of the owner as to coaling at the time of sailing. *The Vortigern* was followed and applied to the warranty of seaworthiness under a voyage insurance policy in *Greenock S.S. Co. v. Maritime Insurance Co.*, (1903) 2 K. B. 657. The owner has been found to have broken the warranty of seaworthiness against the charterer in a case where the charterer was bound to supply coal, but, through the owner's master's negligence, an insufficient supply was shipped: *McIver v. Tate Steamers*, (1903) 1 K. B. 362. A shipowner who has let a ship for a named voyage must not carry more coal than is necessary for the due performance of that voyage. If he does, he is liable for any damage caused thereby to the charterer, such as the expense of lightering to cross a bar: *Darling v. Raeburn*, (1907) 1 K. B. 846.
 (*s*) *Hedley v. Pinkney S.S. Co.*, (1894) A. C. at p. 227; *Maori King v. Hughes*, (1895) 2 Q. B. 550; *Steel v. State Line Co.* (1877), 3 App. C. at p. 86; *The Glenfruin* (1885), 10 P. D. 103. A defect that

The "ordinary perils" may include such treatment of the ship and cargo (*e.g.*, fumigation) as by the local law of a port of call the cargo shipped must be exposed to (*t*). One test is: Would a prudent owner have required that the defect should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy (*u*). The standard of seaworthiness may rise with improved knowledge of shipbuilding (*x*).

The seaworthiness must exist not only at the commencement of loading (*y*), but also at the time of sailing from the port of loading, and it then includes an undertaking that the stowage is fit and proper for the proposed voyage (*z*).

can be remedied in a few minutes at sea is not unseaworthiness: *Hedley v. Pinkney*, (1894), A. C. 222; *Leonard v. Leyland* (1902), 18 Times L. R. 727; *The Diamond*. (1906) P. 283; *Virginia, &c., Co. v. Norfolk, &c. Co.* (1912), 17 Com. Cas. 277. So the need of repairs to one boiler of two preventing its use for a short time was held not unseaworthiness in *The Pentland* (1897), 13 Times L. R. 430. But this principle does not apply to such a thing as securing deck cargo by proper lashings: *Moore v. Lunn* (1922), 38 T. L. R. 649; nor if the defect, though easily remediable, cannot be reached while at sea to be remedied, as in *Steel v. State Line S.S. Co.* (1877), 3 App. C. 72. A fitting which can with care be worked safely, may yet be so unusual and dangerous as to constitute unseaworthiness: *The Schwann*, (1909) A. C. 450. Difficult questions may arise when a seaworthy ship is rendered unfit to carry cargo by bad stowage, whether the ship is unseaworthy, or the exception of negligence protects the shipowner. Cf. *Wade v. Cockerline* (1905), 10 Com. C. 115, with *Bond v. Federal Steam Nav. Co.* (1907), 22 Times L. R. 685; and see *Calcutta S.S. Co. v. Weir* (1910), 15 Com. Cas. 172; *Ingram v. Services Maritimes*, (1913) 1 K. B. 538, at p. 545; *The Thorsa*, (1916) P. 257; *Paterson Zochonis v. Elder Dempster*, (1923) 1 K. B. 420.

(*t*) *Ciampa v. British India Co.*, (1915) 2 K. B. 774.

(*u*) *McFadden v. Blue Star Line*, (1905) 1 K. B. 697, at p. 706.

(*x*) See *per Blackburn, J.*, in *Burges v. Wickham* (1863), 3 B. & S. at p. 693. Thus the H. L. have held a ship unseaworthy because improvements made after she was built have not been introduced into her: *The Mount Park S.S. Co. v. Grey* (Shipping Gazette, March 12, 1910). But presumably seaworthiness need not be maintained "at the cost of always introducing the latest or best appliances": *Virginia, &c. Co. v. Norfolk, &c. Co.* (1912), 17 Com. Cas. at p. 279.

(*y*) If the ship is fit to receive cargo in port, there is no continuing warranty that she shall remain fit until she sails; though she must be fit to start when she starts on her voyage: *McFadden v. Blue Star Line*, (1905) 1 K. B. 697.

(*z*) *Cohn v. Davidson* (1877), 2 Q. B. D. 455; and see end of note (*s*), *supra*. Filling the boilers of a steamship with muddy water at starting has been held unseaworthiness, from which the owner was not protected

If the charterer or shipper discovers the unseaworthiness before commencing the voyage, and the ship cannot be made seaworthy within a time which it is reasonable, under the circumstances, that the charterer or shipper should wait, he may throw up the contract of hire or carriage (a).

The shipowner will be liable in damages (b) for loss caused by (c):—(1) unseaworthiness at starting, unless he is expressly protected from such liability by exceptions in the charter or bill of lading (d); (2) unseaworthiness on the voyage, not covered by exceptions, even though he has no opportunity to repair it; (3) on the ground of negligence, for unseaworthiness on the voyage, though covered by exceptions, which he has an opportunity to repair, if he proceed without repairing (e).

Note 1.—Probably the warranty of seaworthiness was originally expressed in the contract. A charterparty dated

by an exception of negligence of navigation: *Seville Co. v. Colvils* (1888), 15 Sc. Sess. C., 4th Ser. 616; but compare *Cunningham v. Colvils* (1888), 16 Sc. Sess. C., 4th Ser. 295.

(a) *Stanton v. Richardson* (1875), L. R. 9 C. P. 390; *Tully v. Howling* (1877), 2 Q. B. D. 182.

(b) These may include damages and costs the charterer has to pay to other persons by reason of the unseaworthiness: *Scott v. Foley, Aikman & Co.* (1899), 5 Com. Cases, 53.

(c) *The Europa*, (1908) P. 84; approved in *Kish v. Taylor*, (1912) A. C. 604. Contrast the cases of deviation in which the deviation need not cause the loss: *Thorley v. Orchis S.S. Co.*, (1907) 1 K. B. 660. See also *Kish v. Taylor*, (1910) 2 K. B. 309; (1912) A. C. 604.

(d) As in *The Laertes* (1887), 12 P. D. 187. For cases where exceptions did not protect him, see *The Glenfruin* (1885), 10 P. D. 103; *The Undaunted* (1888), 11 P. D. 46; *Seville Co. v. Colvils & Co.* (1888), 15 Sc. Sess. C., 4th Ser. 616; *Gilroy v. Price*, (1893) A. C. 56; *Maori King*, (1895) 2 Q. B. 550; *Queensland Bank v. P. & O. Co.*, (1898) 1 Q. B. 567; *The Waikato*, (1899) 1 Q. B. 56 (C. A.). See the general discussion of the relation of other terms in the contract to express or implied terms as to unseaworthiness in *Bank of Australasia v. Clan Line*, (1916) 1 K. B. 39, and note (x) thereon at p. 238, *post*.

(e) If unseaworthiness arises in the course of the voyage, and the shipowner has an opportunity to remedy it, he is bound to remedy it before proceeding on the voyage, but cannot require the charterer or shipper to wait more than a reasonable time for that purpose. This is not because of the warranty of seaworthiness, unless the doctrine of stages applies; but because of negligence: *Worms v. Storey* (1855), 11 Ex. 427; *The Rona* (1884), 51 L. T. 28; *Thin v. Richards*, (1892) 2 Q. B. 141; *Assicurazioni v. Bessie Morris S.S. Co.*, (1892) 2 Q. B. 652 (C. A.). See also *The Vortigern*, (1899) P. 140.

July 3, 1531 (*f*), contains the passage: "And the sayd owner shall warant the said shypp stronge stanche well and sufficiently vitalled and apparelyd, etc." Part of this still survives.

Note 2.—In time policies of insurance there is no implied warranty of initial seaworthiness (*g*) owing to the hardship of requiring the shipowner to undertake that his vessel is seaworthy at a time when she is at sea beyond his control, a time at which such policies frequently begin to run. There is also the difficulty of deciding what constitutes seaworthiness for a definite time, but for unknown voyages. These considerations do not apply so strongly to time charters, which usually, though not always, commence with the vessel's starting from port for a known voyage. A time charter, therefore, includes an undertaking of seaworthiness at the beginning of the time (*h*). Where several voyages are included in the charter, special provisions are frequently inserted (*i*). In the absence of such provisions, the owner must be held to undertake that his ship is seaworthy on leaving each place where he has an opportunity to remedy unseaworthiness (*k*).

Note 3.—*Seaworthy* means that the ship should be in a condition to encounter whatever perils a ship of that kind and laden in that way might be fairly expected to encounter in making such a voyage at such a time of year (*l*). Thus, the ship must be properly ballasted and dunnaged (*m*). A ship chartered to carry gunpowder must have the magazine required by the Board of Trade regulations. The shipowner must provide the ship with all necessary documents

(*f*) Printed in Marsden, *Select Pleas of the Admiralty Court* (Selden Society, 1892), Vol. I. at p. 37.

(*g*) *Gibson v. Small* (1853), 4 H. L. C. 353.

(*h*) There is a continuing warranty of seaworthiness under a time charter at each stage; e.g., as to sufficiency of coal: *Park v. Duncan*, 25 Sc. Sess. C., 4th Series, 528. See also *Giertsen v. Turnbull* (1908), Sess. Cas. 1101.

(*i*) See *Ripley v. Scaife* (1826), 5 B. & C. 167; *Havelock v. Geddes* (1809), 10 East, 555.

(*k*) *Worms v. Storey* (1855), 11 Ex. 427; *The Rona* (1884), 51 L. T. 28; *Thin v. Richards*, (1892) 2 Q. B. 141; *The Vortigern*, (1899) P. 140.

(*l*) As to fitness to carry cargo, see *Cases 3, 5 and 6* below, and *The Thorsa*, (1916) P. 257; as to luggage, see *Upperton v. Union Castle Co.* (1903), 9 Com. C. 50; and see *Paterson Zochonis v. Elder Dempster & Co.*, (1923) 1 K. B. 420.

(*m*) *Vide* Article 49.

for the voyage (*n*), but in *Wilson v. Rankin* (*o*), the certificate of the port of loading as to stowage, the absence of which did not increase the risk of the voyage, or affect the admissibility of the ship at her port of discharge, was held not an essential to seaworthiness.

Note 4.—Evidence of Unseaworthiness. The burden of proving unseaworthiness as a fact rests upon the party who asserts it. But where a ship, shortly after leaving the port, and without any apparent reason sinks or leaks, the mere facts afford *prima facie* evidence of unseaworthiness, which must be rebutted. This has sometimes incorrectly been stated as a presumption of law, upon the authority of Lord Eldon (*p*). There is no legal presumption in the matter, or any real shifting of the burden of proof. But the inference of fact arising under such circumstances is some discharge of the burden, and in the absence of any evidence to explain the disaster otherwise may be a complete discharge (*q*).

Note 5.—As to unseaworthiness causing fire and its result upon the shipowner's statutory immunity under sect. 502 of the Merchant Shipping Act, 1894, see Article 87.

Case 1.—F. shipped goods under a bill of lading, which excepted "perils whether or not arising from negligence of A.'s servants, risk of craft or hull, or any damage thereto, &c." Seawater entered through the negligence of some of the crew in leaving a lower port insufficiently fastened. *Held*, that if this were so at the beginning of the voyage the ship was then unseaworthy, and the exceptions of the bill of lading did not protect the shipowner, as they do not apply till the voyage has begun (*r*). That such a bill of lading contained an implied undertaking that the ship was, at the time of its departure, reasonably fit for accomplishing the services which the shipowner engaged to perform (*s*).

Case 2.—A ship was chartered to proceed to a wharf in the

(*n*) *Levy v. Costerton* (1816), 4 Camp. 389; *Dutton v. Powles* (1861), 30 L. J. N. S. Q. B. 169; *Cianpa v. Brit. India Co.*, (1915) 2 K. B. 774.

(*o*) (1865), L. R. 1 Q. B. 162.

(*p*) *Watson v. Clark* (1813), 1 Dow H. L. C. 336; *Parker v. Potts* (1815), 3 Dow H. L. C. 23.

(*q*) *Anderson v. Morice* (1874), L. R. 10 C. P. 58, 609; *Pickup v. Thames and Mersey* (1878), 3 Q. B. D. 594; *Ajum Goolam v. Union Marine Co.*, (1901) A. C. 362; *Lindsay v. Klein*, (1911) A. C. 194.

(*r*) In charters, both the carrying voyage and the chartered voyage, which need not coincide with the carrying voyage; in bills of lading, the carrying voyage: *Hudson v. Hill* (1874), 43 L. J. C. P. 273; *Barker v. M'Andrew* (1865), 18 C. B. N. S. 759.

(*s*) *Steel v. State Line Steamship Co.* (1877), L. R. 3 App. C. 72; *cf. Gilroy v. Price*, (1893) A. C. 56.

river X., and there take on board a cargo, and proceed to Z. She was seaworthy when she began to load, but unseaworthy when she put to sea. *Held*, that the owner undertakes that the ship shall be seaworthy for the intended voyage at the time of her sailing on it: that what is seaworthiness for loading in harbour may be unseaworthiness for the voyage: that the ship may be, without any breach of the undertaking, unseaworthy for the voyage while in port, if she is seaworthy for loading, but will break the undertaking if she leaves port in that condition (t).

Case 3.—A ship was chartered to proceed to the East Indies and take on board a cargo of, *inter alia*, wet sugar. The ship was seaworthy for any cargo except wet sugar, for which she had not pumps of sufficient capacity. *Held*, that the charter implied an undertaking that the ship was fit to carry wet sugar, and that, as the ship could not be made fit without a delay unreasonable under the circumstances of the contract, the charterer was justified in throwing up the charter (u).

Case 4.—A ship was chartered on March 4, "for twelve months, for as many consecutive voyages as the said ship can enter upon after completion of the present voyage" from X. to Z. When the ship had completed that voyage, she was found to be unseaworthy, and the necessary repairs delayed her for two months. The charterer threw up the charter. *Held*, by the whole Court that he was justified: by *Brett, J.*, on the ground that the ship was not reasonably fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure (x): by the rest of the Court (y), on the ground that time was of the essence of the contract, and that the charterer was not bound to

(t) *Cohn v. Davidson* (1877), 2 Q. B. D. 455; in *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377, where armour-plates broke loose from their stowage and sank the ship, the question left to the jury was: "Was the ship at the time of sailing in a state, as regards the receiving and stowing of the plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season?"

(u) *Stanton v. Richardson* (1875), L. R. 9 C. P. 390; affirmed in H. L., see 1 Q. B. D. p. 381. "Seaworthiness" has a wide meaning, "reasonably fit to carry the cargo contracted for"; cf. the judgments in *Steel v. State Line*, *ante* and *Cases-5* and 6, *post*. But unfitness arising merely from negligent stowage may not amount to unseaworthiness: *The Thorsa*, (1916) P. 257. In *Rathbone v. McIver* (1902), 8 Com. Cases, 1, Wills, J., limited "unseaworthiness" in a particular bill of lading to unseaworthiness of the ship to meet perils of the sea, without regard to the safety of the cargo. This decision was reversed by the C. A., (1903) 2 K. B. 378. See also *Upperton v. Union Castle Co.* (1903), 9 Com. Cases, 50.

(x) It seems that this is more in accord with principle than the other view; if time were of the essence of the contract, one day's delay would free the charterer, but the Court recognised the other position in the phrase "a substantially different time."

(y) *Mellish, L.J., Amphlett, J.A., Kelly, C.B.*

accept the ship for a time shorter than or substantially different from that which he had contracted for (z).

Case 5.—F. shipped cattle under a bill of lading agreeing that the shipowner was not liable for accidents, disease, or mortality, and under no circumstances for more than £5 per animal. The ship, after carrying a cargo of cattle on a previous voyage, was improperly cleaned, and F.'s cattle took foot-and-mouth disease. *Held*, there was a duty on the shipowner to have the ship reasonably fit for the carriage of the goods he had contracted for, and that, such duty being neglected, the limitations of liability did not apply (a).

Case 6.—A steamer carried frozen meat from Australia to Europe with an exception in the bill of lading, "steamer shall not be accountable . . . for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery." On the voyage the refrigerating machinery broke down, owing to its defective condition at starting, and the meat was damaged. *Held*, that there was an implied warranty that the ship should at starting be fitted with refrigerating machinery fit to carry the meat to Europe; that this warranty was broken; that the exceptions therefore did not apply, and that the shipowner was liable (b).

Case 7.—A steamer sailed from the Philippines for Liverpool, under a contract giving liberty to call at coaling-ports and excepting the negligence of master and engineer. At Colombo, she coaled, but did not take on board sufficient coal to reach Suez. Off Perim, a coaling-station, the engineer negligently informed the master there were sufficient coals to reach Suez, and the master in consequence did not put into Perim to coal. Coals ran short in the Red Sea. *Held*, that there was a breach of the warranty of seaworthiness either (a) on leaving Colombo without sufficient coal to reach Suez, or (b) off Perim in not commencing the stage from Perim to Suez with sufficient coal (c).

(z) *Tully v. Howling* (1877), 2 Q. B. D. 182.

(a) *Tattersall v. National S.S. Co.* (1884), 12 Q. B. D. 297. Contrast *The Thorsa*, (1916) P. 257; and see the discussion of the relation of bad stowage to unseaworthiness in *Paterson Zochonis & Co. v. Elder Dempster & Co.*, (1923) 1 K. B. 420.

(b) *Maori King v. Hughes*, (1895) 2 Q. B. 550 (C. A.). See also *Queensland Bank v. P. & O. Co.* (1898) 1 Q. B. 567 (C. A.), in which in a bill of lading for the carriage of specie, on an admission that it was usual to carry specie in a bullion room, there was *held* an implied warranty that the bullion room was reasonably fit to resist thieves; and *The Waikato*, (1899) 1 Q. B. 56 (C. A.), where, wool being damaged by being stowed in an insulated hold, there was *held* to be an implied warranty that the hold was fit to carry wool, in spite of an exception: "loss or damage arising from . . . defects latent on beginning voyage or otherwise."

(c) *The Vortigern*, (1899) P. 140; cf. *Thin v. Richards*, (1892) 2 Q. B. 141; *Biccard v. Shepherd* (1861), 14 Moore, P. C. 471; *Dixon v. Sadler* (1839), 5 M. & W. 405; *McIver v. Tate Steamers*, (1903) 1 K. B. 362.

Case 8.—A ship was chartered, “then being tight, staunch, and strong,” to proceed from X. to Z., “all other unavoidable (d) hindrances, dangers and accidents of the sea excepted.” She was seaworthy when she started, but became unseaworthy by excepted perils during the voyage, and put into a port, where she could have been repaired. She proceeded to sea without repairs. *Held*, that she was not bound to repair or proceed, but if she wished to proceed, she must repair, and that the owner was liable for damage on the further voyage, caused by the unseaworthiness of his vessel (e).

Case 9.—A vessel was damaged while on her voyage by decks straining, and the master, having an opportunity to repair, proceeded without caulking the decks. In consequence the cargo was damaged. *Held*, that the shipowner was liable for such damage (f).

Case 10.—A ship, chartered to carry tea, carried antimony as ballast. The charterers, alleging that the fumes of antimony were prejudicial to tea, refused to load. Antimony in fact was not prejudicial to tea. *Held*, that the ship being in fact fit to carry the cargo, the fact that there was a general belief that it was unfit was no defence to the charterer (g).

Case 11.—A ship sailed from an Eastern port with a foul bill of health. At Naples lemons were shipped under a bill of lading for London. Marseilles was the next port of call; and under French law the ship coming from an Eastern port without a clean bill of health, had to be fumigated. The lemons were damaged by the fumigation. *Held*, that the ship was not seaworthy at Naples for the carriage of the lemons (h).

Note.—It is not now unusual to find in bills of lading a clause limiting this undertaking to one that due diligence has been used to make the ship seaworthy: e.g. “All the above exceptions are conditional on the ship being seaworthy when she sails on the voyage, but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners, or any of them, or the ship’s husband or manager”; or, “It is expressly declared that the company are not liable for loss or damage occasioned by any defects whatsoever in the hull, machinery, or equipment of this vessel . . . whether such defects existed before the commencement of or arose or developed during the voyage,

(d) *Unavoidable*=Unavoidable by ordinary dispatch and diligence: *Granger v. Dent* (1829), M. & M. 475.

(e) *Worms v. Storey* (1855), 11 Ex. 427.

(f) *The Rona* (1884), 51 L. T. 28.

(g) *Towse v. Henderson* (1850), 4 Ex. 890.

(h) *Ciampa v. British India Co.*, (1915) 2 K. B. 774.

provided all reasonable means have been taken to make the vessel seaworthy" (i).

A common Liverpool exception is "unseaworthiness of the vessel at the commencement of the voyage, provided all reasonable means have been taken to provide against the same" (k). A few bills go so far as even to attempt to negative liability even for unseaworthiness caused by negligence, *e.g.* "In accepting this bill of lading the shipper expressly agrees that the steamer is seaworthy and reasonably fit for the carriage of the cargo herein contracted to be carried (l), at the time of starting on the voyage, and under no circumstances is such seaworthiness or fitness to be questioned"; and, again, "not liable for act, neglect, or default of any person or persons in providing, dispatching, and navigating the ship."

A form of clause which has been adopted in consequence of the Harter Act (see Appendix V.) exempts the owners from negligence in navigation or management provided due diligence has been exercised by her owners to make the vessel in all respects seaworthy. A similar exception exempts from liability for loss by unseaworthiness provided the owner has exercised due diligence to make the vessel seaworthy. The former clause was held in *Dobell v. S.S. Rossmore* (m), to require not only that the owner, but also that all persons employed by him to ensure seaworthiness, should have used due diligence. In either case the clause does not seem of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (*e.g.* a defect causing unseaworthiness but of so latent a nature that due diligence could not have discovered it) are not likely to occur often. The Harter Act itself does not cut down the warranty of seaworthiness to one to use due diligence to make the ship seaworthy (n).

(i) These two exceptions bear the mark of *The Glenfruin* (1885), 10 P. D. 103. See other clauses in *The Laertes* (1887), 12 P. D. 187, where the shipowner was held protected by exceptions limiting the warranty of seaworthiness.

(k) As to the meaning of "unseaworthiness" in such a clause, see *Rathbone v. McIver*, (1903) 2 K. B. 378.

(l) This bears the mark of *Tattersall v. National S.S. Co.* (1884), 12 Q. B. D. 297.

(m) *Dobell v. S.S. Rossmore*, (1895) 2 Q. B. 408.

(n) *McFadden v. Blue Star Co.*, (1905) 1 K. B. 697.

*Article 30.—Undertaking of Reasonable Dispatch—
Effect of Delay.*

I. The shipowner impliedly undertakes that his vessel shall be ready to commence the voyage agreed on, and to load the cargo to be carried, and shall proceed upon and complete the voyage agreed upon, with all reasonable dispatch.

If by his breach of this undertaking there is such delay as “goes to the root of the whole matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship” (*o*), the charterer may refuse to perform his part of the contract altogether (*p*).

If the delay is not so serious as to have this result, the charterer cannot refuse to load (*q*), but the shipowner will be liable for damages (*r*), unless the delay was caused by an excepted peril (*s*).

Delay during the course of the voyage may constitute a deviation, as to which see Article 99, *infra*.

II. Apart from any question of breach of contract, and under a different principle, circumstances which delay its performance may destroy the rights and obliga-

(*o*) *Per Willes, J., MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643 at p. 648.

(*p*) *Freeman v. Taylor* (1831), 8 Bing. 124; *Tully v. Howling* (1877), 2 Q. B. D. 182. This is an application of the general principle that default in performance by one party may be of such a nature as to entitle the other to regard it as a repudiation of the whole contract. *Herst v. Osborne* (1856), 18 C. B. 144, was wrongly decided (see *per Bramwell, B., Jackson v. Union Marine* (1874), L. R. 10 C. P. at p. 147), and *Hudson v. Hill* (1874), 43 L. J. C. P. 273, cannot be regarded as satisfactory.

(*q*) *Clipsham v. Vertue* (1843), 5 Q. B. 265; *Tarrabochia v. Hickie* (1856), 1 H. & N. 183. Cf. *Bornmann v. Tooke* (1808), 1 Camp. 377; *Collard v. Carswell* (1892), 19 Sess. Cas. 987; and *Kidston v. Monceau* (1902), 7 Com. Cas. 82.

(*r*) *Medeiros v. Hill* (1832), 8 Bing. 231; *M'Andrew v. Adams* (1834), 1 Bing N. C. 29; *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643; *The Wilhelm* (1866), 14 L. T. 636. Cf. *Engman v. Palgrave* (1898), 4 Com. Cas. 75; and *Associated Portland Cement Co. v. Houlder* (1917), 22 Com. Cas. 279.

(*s*) *Barker v. M'Andrew* (1865), 18 C. B. N. S. 759; *Donaldson v. Little* (1882), 10 Sess. Cas., 4th Ser. 413. See also Article 33.

tions of both parties to the contract in a charterparty (*t*), or in a bill of lading (*u*). This, in regard to charterparties, is commonly referred to under the phrase "frustration of the commercial purpose of the adventure" (*x*), but is really a particular application of the more general principle that a contract which by supervening and unforeseen circumstances becomes impossible of performance may cease to bind either party to it (*y*).

The contract in such a case comes to an end by virtue of an implied term in it (*z*). It is for the Court to find the existence of the implied term as a matter of construction (*a*). If an event makes the implied term operative the contract is automatically terminated thereby, and not by reason of the election of either party (*b*).

The contract may be put an end to in this way, whether it is still executory, or has been in part already performed (*c*).

(*t*) *Jackson v. Union Marine Co.* (1874), L. R. 10 C. P. 125, is the leading authority. *Hadley v. Clarke* (1799), 8 T. R. 259, and *Touteng v. Hubbard* (1802), 3 B. & P. 291, referred to therein, must be treated as wrongly decided on the facts, if not on the law. Lord Finlay, L.C., says so as to *Hadley v. Clarke* in *Metropolitan Water Board v. Dick, Kerr & Co.*, (1918) A. C. 119.

(*u*) For obvious reasons the question can rarely arise on a bill of lading. It would have arisen in *Embiricos v. Reid*, (1914) 3 K. B. 45, on a claim, by the shipper under a bill of lading for the cargo in fact loaded, to have it redelivered to him, in which he must have succeeded. And see *Scottish Navigation Co. v. Souter*, (1917) 1 K. B. 222.

(*x*) See Note at the end of this article.

(*y*) "The charterer is released from the charter. When I say *he* is, I think *both* are" (*per* Bramwell, B., *Jackson v. Union Marine Co.* (1874), L. R. 10 C. P. at p. 144). "It would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—the shipper with cargo which might be perishable, or its market value destroyed, the shipowner with his ship lying idle, possibly rotting, the result of which might be to make the contract ruinous" (*per* Cockburn, C.J., *Geipel v. Smith* (1872), L. R. 7 Q. B. at p. 410).

(*z*) *Taylor v. Caldwell* (1863), 3 B. & S. 826. *Cf.* Lord Loreburn, *Tampin v. Anglo-Mexican Co.*, (1916) A. C. at p. 404.

(*a*) *Comptoir Commercial v. Power*, (1920) 1 K. B. 868.

(*b*) *Bankes, L.J., Larrinaga v. Société Franco-Américaine* (1922), 28 Com. Cas. at p. 2; Lord Sumner, *Bank Line v. Capel*, (1919) A. C. at p. 454.

(*c*) *Embiricos v. Reid*, (1914) 3 K. B. 45. The notion to the contrary originated from passages in the judgment of Blackburn, J., in *Geipel v. Smith* (1872), L. R. 7 Q. B. 404. But those passages resulted

Whether the supervening obstacle involves such delay as to frustrate the commercial purpose of the adventure (or, in the wider phrase, creates impossibility of performance) is a question of fact in each case, and must also be a question of probabilities. Some occurrences, *e.g.*, a war or a blockade (*d*), are of themselves so indefinite and serious in their likely duration that frustration may in most cases be assumed. Others, such as a strike (*e*), cannot in themselves warrant the assumption. In other cases, *e.g.*, where the ship is damaged, the probabilities can be estimated by surveys or estimates as to the time (*f*) and the expense (*g*) that will be involved in repairing her.

If, judging reasonably of probabilities at the time he so claims, a party has rightly asserted the contract to be frustrated and at an end, he cannot afterwards be held liable on the ground that events have not turned out according to his expectations (*h*).

Where, under this principle, the obligations of the contract come to an end (or it is discharged by impossibility of performance), the contract is not rescinded *ab initio*. Consequently "any payment previously made, and any legal right previously accrued, according to the terms of the agreement, will not be disturbed" (*i*).

from the supposed necessity of treating *Hadley v. Clarke* (*ubi supra*) and *Touteng v. Hubbard* (*ubi supra*), both of whom he cites in his judgment, as rightly decided. They cannot now be so regarded; see footnote (*i*) on p. 107.

(*d*) "A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this" (*per Lush, J., Geipel v. Smith* (1872), L. R. 7 Q. B., at p. 414; *Metropolitan Water Board v. Dick, Kerr & Co.* (C. A.), (1917) 2 K. B. 1.

(*e*) *Ropner v. Ronnebeck* (1914), 20 Com. Cas. 95.

(*f*) *Jackson v. Union Marine* (1874), L. R. 10 C. P. 125.

(*g*) *Assicurazioni v. Bessie Morris*, (1892) 2 Q. B. 652.

(*h*) *The Savona*, (1900) P. 252; *Embiricos v. Reid*, (1914) 3 K. B. 45. *Query*, how far *Millar v. Taylor*, (1916) 1 K. B. 402, accords with this principle. It is best treated as a case of merely temporary suspension.

(*i*) *Chandler v. Webster*, (1904) 1 K. B. 493, *per Romer, L.J.* Cf. *Civil Service Society v. General Steam Co.*, (1903) 2 K. B. 756; *Lloyd Royal Belge v. Stathatos* (1917), 34 T. L. R. 70; *French Marine v. Compagnie Napolitaine* (1921), 27 Com. Cas. 69. This rule sometimes must act hardly on one party, *e.g.*, where in a contract to build a ship

Case 1.—A.'s ship was chartered to C. to proceed to the Cape, there deliver cargo, and thence to proceed with all convenient speed to Bombay, where C. was to load cotton. The ship stayed eight days longer at the Cape than was necessary and then loaded cattle for Mauritius. Proceeding to Bombay *viâ* Mauritius, she arrived six weeks later than she would have done by proceeding direct. C. refused to load. It was left to the jury to say whether the delay was such as to put an end to the ordinary objects C. might have had in view when he made the contract. The jury found a verdict for C. *Held*, a proper direction and a new trial refused (*j*).

Case 2.—A ship which was in London was chartered as "bound to Nantes" to load there and proceed to Z. Before proceeding to Nantes the ship went to Newcastle. The charterer alleged unreasonable delay and refused to load. *Held*, that such an allegation was only a ground for an action for damages, and would not support a repudiation of the charter unless it was also alleged that the delay frustrated the object of the voyage (*k*).

Case 3.—A ship was chartered "with all convenient speed, having liberty to take an outward cargo for owner's benefit, direct on the way, to proceed to X. and there load a full cargo." The ship deviated to Y., which was not "direct on the way" to X., and arrived at X. a few days late. The charterer refused to load. It was admitted that the object of the voyage was not frustrated, and the whole Court *held* that the charterer was not entitled to repudiate the charter, but had his remedy in damages (*l*).

Case 4.—A ship, then at X., was chartered to "proceed to the usual loading place there, guaranteed for cargo in all October,

the purchaser pays £20,000, on signature of the contract, and in part prepayment of the price, and then, before the builders have done a stroke of work, the contract is dissolved by "frustration." [The case put as above hypothetically in our 10th edition actually arose for decision, with the substitution of £2,310 for £20,000, in *Cantiere San Rocco v. Clyde Co.* (1922), Sc. L. T. 477.] It may be of interest to note the different provision made by sect. 65 of the Indian Contract Act. When the Courts invented the doctrine of the implied term under which the contract was to be at an end, they might reasonably have assumed as part of the implication a provision that either party who by part performance by the other had received benefit should, so far as possible, restore such advantage to the other or compensate him for it. Observe in this connexion the unsuccessful argument of counsel for the defendants in *The Teutonia* (1871), L. R. 3 A. & E. 394, at pp. 405, 406.

(*j*) *Freeman v. Taylor* (1831), 8 Bing. 124. *Cf. Tully v. Howling* (1877), 2 Q. B. D. 182.

(*k*) *Cliphsham v. Vertue* (1843), 5 Q. B. 265. *Cf. Tarrabochia v. Hickie* (1856), 1 H. & N. 183.

(*l*) *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643. *Cf. Medeiros v. Hill* (1832), 3 Bing. 231; and *MacAndrew v. Adams* (1834), 1 Bing. N. C. 29. The last is a good example of the double undertaking (a) expressly to arrive by a certain date, under penalty of a cancelling clause, (b) impliedly to use reasonable dispatch. Arrival within the time specified under (a) did not relieve the shipowner from damages for breach of (b).

and there load and proceed to Z.," with an exception of certain perils "during the voyage." The vessel started for the usual loading place, but was prevented by excepted perils from arriving there until after considerable delay. The charterer loaded cargo, but sued the shipowner for damages. *Held*, that passage to the place of loading was part of the voyage, and the shipowner was protected by the exceptions from the claim (*m*).

Case 5.—A ship was chartered in November, 1871, to proceed with all possible dispatch, dangers and accidents of navigation excepted, from Liverpool to Newport, and there load iron for San Francisco. She sailed from L. to N. on January 2, 1872, but stranded on the way on January 3. The necessary repairs took till the end of August. On February 15 the charterers threw up the charter. The jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and charterer (*n*). *Held*, that the charterer was justified in throwing up the charter (*o*).

Case 6.—C. chartered a Greek ship to load a cargo of grain in the Sea of Azov and carry it to the United Kingdom. The ship arrived at the loading port on October 1, 1912, just before war broke out between Greece and Turkey. She commenced to load, but next day C. stopped loading because the Turks were seizing and detaining Greek ships at the Dardanelles. War was declared on October 18. The lay-days expired on October 22. On October 21 C. purported to cancel the charter. The ship was unable to leave the Black Sea until the war ended in September, 1913. *Held*, that C. was justified in treating the charter as at an end (*p*).

Case 7.—C. chartered A.'s steamer on a time charter for sixty calendar months. The chartered period began on December 4, 1912, and would consequently end on December 4, 1917. In February, 1915, the steamer was requisitioned by the British Government for war services. A claimed that the charterparty was determined or suspended (*q*) by this requisition. C. claimed

(*m*) *Barker v. M'Andrew* (1865), 18 C. B. N. S. 759.

(*n*) *I.e.*, of both. Contrast the direction to the jury in *Case 1*, where the delay was by breach of the shipowner's undertaking, and its limitation to the objects the charterer had in view.

(*o*) *Jackson v. Union Marine* (1874), L. R. 10 C. P. 125. The question here was as to the time for repairs. In *Assicurazioni v. Bessie Morris*, (1892) 2 Q. B. 652, on the shipowner's claim to put an end to the charter, the question was their expense. The decision that he must prove commercial impossibility to repair (*i.e.*, commercially, destruction of the ship) illustrates the connection of these cases as to frustration with cases as to destruction of the subject-matter of a contract, like *Taylor v. Caldwell* (1863), 3 B. & S. 826.

(*p*) *Embiricos v. Reid*, (1914) 3 K. B. 45. *Cf. Geipel v. Smith* (1872), L. R. 7 Q. B. 404.

(*q*) The claim that the charter was "suspended" was not seriously argued in the K. B. D., and not at all in the C. A. or H. L. It was

that it was not, being ready to continue to pay the monthly hire despite the requisition, and suggesting that during the requisition he would receive the remuneration payable by the Government for use of the steamer. *Held*, that the requisition did not put an end to the charter (r).

Case 8.—A. chartered his ship to C. under a time charterparty form for "one Baltic round," freight being payable at so much per month until completion of such employment. The service began on July 4, 1914, and the vessel went to the Baltic to load under a sub-charter made by C. with D. At the beginning of August, 1914, when the war broke out, she was partly loaded, and some bills of lading had been issued by the captain to D. By reason of the war and orders of the Russian authorities the ship had to remain at her port of loading and was still there at the date of the action. On August 5 C. refused to pay further time hire. On November 6 A. sued C. for hire up to November 4. *Held*, that the charter was to be treated as frustrated and determined on and after the outbreak of war (s).

Case 9.—C. chartered A.'s steamer for a voyage from X. to Z. and back, at a monthly hire payable each month in advance. The first month's hire was paid and the ship placed at C.'s disposal. When she should have sailed from X. on 2nd December, the authorities there refused to allow her to leave, and they did not release her until 10th February following. On 12th December C. claimed that the charter was dissolved, and claimed repayment of the first month's hire. *Held*, (i) that the charter was dissolved on 2nd December, but (ii) that C. could not recover back the first month's hire (t).

Case 10.—C. chartered A.'s steamer by a charter dated 16th February, 1915, for twelve months. The charter provided that the service should not begin before 1st April, 1915, and if the steamer was not ready by 30th April, 1915, C. might cancel.

clearly not sustainable. *Cf. Modern Co. v. Duneris S.S. Co.*, (1917) 1 K. B. 370.

(r) *F. A. Tamplin S.S. Co. v. Anglo-Mexican Co.*, (1916) A. C. 397. So *held* by Lord Buckmaster, L.C., Lord Loreburn, and Lord Parker. The dissentient view of Lord Haldane and Lord Atkinson was really only on the question of fact whether the degree of interruption of performance of the contract amounted to its frustration. The question whether charterer or shipowner should receive the payments from the Government, or share them, was not raised or decided in the case, as Lord Parker points out at p. 428.

(s) *Scottish Navigation Co. v. Souter; Admiral S.S. Co. v. Weidner*, (1917) 1 K. B. 222. The facts in the second case were practically indistinguishable, except that the agreed employment of the ship was for "two Baltic rounds." It was agreed during the argument in the C. A. that a "Baltic round" ordinarily means a voyage from the United Kingdom to a Baltic port or ports, with leave to call at a port or ports substantially on the route thither, and returning from the Baltic to a United Kingdom port with leave to call on the way back at a port or ports substantially on that route.

(t) *Lloyd Royal Belge v. Stathatos* (1918), 34 T. L. R. 70.

She was not so ready, but C. did not cancel. Just before her service was about to begin she was on 11th May, 1915, requisitioned by the Government. On 2nd September, 1915, she was released. C. then claimed that she must be placed at his disposal for twelve months. A. claimed that the charter had been dissolved. *Held*, that the charter had been dissolved and that C.'s claim failed (*u*).

Note 1.—Originally the rule of English law was that where a man has, so far as the express terms of his contract run, unconditionally contracted to do something, he is bound to do it, or to pay damages, though supervening events may make performance by him impossible. The rights and duties of the parties to the contract "are conclusively fixed upon, and defined by, the terms of their own written contract. No *exception* (of a private nature at least) which is not contained in the contract itself, *can be grafted upon it by implication*, as an excuse for its non-performance. The rule laid down in the case of *Paradine v. Jane* (*u*) has been often recognised in Courts of law as a sound one; i.e., that 'where the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract' " (*x*). The rigour of this rule was maintained (*y*) until about the middle of the nineteenth century, when it was modified by the rule that a Court may find that there was an *implied* term of the contract under which a contractor may be excused in the case of supervening impossibility. This was first clearly laid down in *Taylor v. Caldwell* (*z*). Earlier cases had in fact allowed this modification of the older rule, especially in cases as to personal services rendered impossible by death or illness (*a*), but *Taylor v. Caldwell* seems to be the first case which in terms lays down that there may be that implied term of which Lord Ellenborough in *Atkinson v. Ritchie* (*x*) had denied the possibility. After the decision in *Taylor v. Caldwell* (*z*) and the subsequent cases which have so extended the application of the

(*u*)—*Bank Line v. Capel*, (1919) A. C. 435.

(*w*) (1647), Aleyn, 26.

(*x*) Lord Ellenborough, *Atkinson v. Ritchie* (1809), 10 East, at p. 533.

(*y*) *Cf. Spence v. Chadwick* (1847), 10 Q. B. 517, in which Paterson, J., at p. 528, and Wightman J., at p. 530, both cite the passage from *Atkinson v. Ritchie* quoted above.

(*z*) (1863), 3 B. & S. 826. *Cf.* as to the above *Ralli v. Compania Naviera*, (1920) 2 K. B. 287.

(*a*) *Cf. e.g., Hall v. Wright* (1858), E. B. & E. 746.

principle there enunciated (an extension which has nowhere gone further than in what are called the Coronation cases), the passage in *Atkinson v. Ritchie* (a) seems to have lost much of its foundation. Yet subsequently to *Taylor v. Caldwell* (b) it continues to be quoted without qualification, e.g. in *Jacobs v. Credit Lyonnais* (c), and quite recently by Lord Atkinson in *Matthey v. Curling* (d).

The modified rule of *Taylor v. Caldwell* (b) that the mutual obligations of a contract may be discharged by supervening impossibility of performance (e), by virtue of an implied term (f) in the contract that it shall be determined in that event, has been applied in a variety of circumstances. The following may be taken as the most material:—

- (i.) Where by a change in English law further performance of the contract becomes illegal (g).
- (ii.) Where in a contract for personal service the contractor dies or becomes physically disabled (h).
- (iii.) Where the subject-matter of the contract, or something essential for its performance, is destroyed (i).

(b) (1863), 3 B. & S. 826.

(c) (1884), 12 Q. B. D. at p. 603. See the discussion of this case in *Ralli v. Compania Naviera*, (1920) 2 K. B. 287, especially by Scrutton, L.J., at pp. 300, 301.

(d) (1922), 2 A. C. 180, at p. 234.

(e) See especially the opinion of Lord Atkinson in *Horlock v. Beal*, (1916) 1 A. C. at p. 495, on the doctrine in general, and that of Lord Sumner in *Bank Line v. Capel*, (1919) A. C. 435, on its application to charterparties.

(f) Cf. Blackburn, J., *Taylor v. Caldwell* (1863), 3 B. & S. at p. 833. "It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted" (per Lord Loreburn, *Tamplin v. Anglo-Mexican Co.*, (1916) A. C. at p. 404). Whether the term relied upon should be implied is a question of law for the Court: *Comptoir Commercial v. Power*, (1920) 1 K. B. 868.

(g) *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180. Cf. *Duncan Fox v. Schrempff and Bonke*, (1915) 3 K. B. 355; and *Arnhold Karberg v. Blythe*, (1916) 1 K. B. 495; *Metropolitan Water Board v. Dick, Kerr & Co.*, (1918) A. C. 119. It would appear from the reasoning in *Ralli v. Compania Naviera*, (1920) 2 K. B. 287, that the sentence in the text above might read "English or foreign law," as regards the effect of the law of a foreign country in preventing performance in the agreed place of performance in that foreign country.

(h) *Robinson v. Davison* (1871), L. R. 6 Exch. 269; *Poussard v. Spiers* (1876), 1 Q. B. D. 410.

(i) *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Appleby v. Myers* (1867), L. R. 2 C. P. 651; *Nickoll v. Ashton*, (1901) 2 K. B. 126; *Shipton Anderson v. Harrison*, (1915) 3 K. B. 676.

(iv.) Where circumstances, of which the parties must have regarded the continued existence as essential to performance, cease to exist (*k*).

(v.) Where circumstances supervene which render performance of the contract in the time contemplated by both parties, impossible (*l*).

“When this question arises in regard to commercial contracts . . . the principle is the same, and the language used as to ‘frustration of the adventure’ merely adapts it to the class of cases in hand” (*m*.) The phrase, especially in its commoner and fuller form, “frustration of the commercial purpose of the adventure,” is perhaps a little unfortunate. A slight variation, in phrase or thought, makes it “the common purpose,” and this suggests that the event, which has happened, or has failed to happen, must defeat both the respective objects for which the two parties made the contract, or must destroy the benefits which both respectively were to secure under it. But this can happen rarely, if ever: in most cases the object of one party—to receive payment for goods sold, or for services rendered, or the like—is fully capable of fulfilment.

In recent times this doctrine has very frequently been in question in regard to the effect upon a charterparty of a requisition of the ship by the British Government. It is to be regretted that in the first case in which that question came before the highest tribunal (*n*) there was a great conflict of judicial opinion. The case was decided in favour of the charterer, who contended that the charter was still in force (*o*), by three judges (Lord Buckmaster, L.C., Lord Loreburn, and Lord Parker) against two (Lord Haldane and Lord Atkinson). This division of opinion was chiefly in regard to the facts of the case, though there was some divergence as to the legal principle. And as regards the principle the division of opinion was rather between Lord

{*k*) The Coronation cases; *Krell v. Henry*, (1903) 2 K. B. 740; *Blakeley v. Muller*, *ibid.*, p. 760, *note*; *Chandler v. Webster*, (1904) 1 K. B. 493. The decision in *Herne Bay Co. v. Hutton*, (1903) 2 K. B. 683, differs not as to the principle, but as to its application to the facts.

(*l*) *Jackson v. Union Marine Co.* (1874), L. R. 10 C. P. 125; *Horlock v. Bcal*, (1916) 1 A. C. 486; *Scottish Navigation Co. v. Souter*, (1917) 1 K. B. 222.

(*m*) *Per* Lord Loreburn, *Tamplin v. Anglo-Mexican Co.*, (1916) 2 A. C. at p. 404.

(*n*) *Tamplin v. Anglo-Mexican Co.*, (1916) 2 A. C. 397.

(*o*) In that case the Admiralty hire exceeded the chartered hire; hence it was the charterer who claimed that the charter remained effective. In later cases the relation of the two rates of hire, and in consequence the contentions of charterer and shipowner, were usually reversed.

Loreburn, Lord Haldane, and Lord Atkinson on the one hand (*p*), and Lord Buckmaster and Lord Parker, on the other. This has produced the somewhat singular result that the principle deduced from that case, and subsequently applied by other Courts in subsequent cases (*q*), is really that laid down by Lord Loreburn alone, *viz.*, that if the requisition was likely to outlast the whole remaining period of the charterparty the contract would be dissolved, but if the requisition was likely to last for a period substantially less than the remaining period of the charter, it would not be dissolved. In the subsequent cases (*q*), in accordance with this, the evidence of shipbrokers has been adduced and admitted to prove how long, from their experience, the parties as reasonable business men ought, at the date of the requisition, to have expected that it would last.

The view that the doctrine of frustration cannot apply to a time charterparty in its ordinary form was at one time entertained (*r*), but it is now settled that this is erroneous (*s*). Of course a time charterparty like any other contract is subject to the usual incidents of the law of contract; the suggestion was that the implication, under which it would be dissolved, was inconsistent with the express terms of the contract.

Another question that arose in regard to these cases was quite distinct, *viz.*, if the charter was not dissolved, was the charterer or the shipowner entitled to the hire paid by the Admiralty? Lord Parker alone in *Tamplin's case* (*t*) in an *obiter dictum* (since the point did not expressly arise, and was not argued (*u*)), suggested that the hire paid by the Admiralty would need to be apportioned between the two of them in accordance with the extent of their respective rights

(*p*) "It will be found that the principles of law enunciated by Lord Loreburn and by the two dissentients are identical." *Per* Lord Finlay, L.C., *Bank Line v. Capel*, (1919) A. C. at pp. 442, 443.

(*q*) *E.g.*, *Countess of Warwick Co. v. Le Nickel Soc. Anon.*, (1918) 1 K. B. 372; *Anglo-Northern Co. v. Emlyn Jones*, (1918) 1 K. B. 372; *Heilgers v. Cambrian Co.* (1918), 34 T. L. R. 720.

(*r*) By Bailhache, J. (fortified by the opinion of an anonymous arbitrator in an earlier case), in *Admiral Shipping Co. v. Weidner Hopkins*, (1916) 1 K. B. 429. Lord Parker expressed a qualified approval of this view in *Tamplin v. Anglo-Mexican Co.* (*ubi supra*).

(*s*) *Scottish Co. v. Souter*, (1917) 1 K. B. 222. See also the opinion of Lord Sumner in *Bank Line v. Capel*, (1919) A. C. 435.

(*t*) (1916) 2 A. C. at p. 428.

(*u*) It appeared to be assumed by the shipowner at all stages of that case that if the charter was not frustrated the charterer would receive all the Government hire, an assumption which the charterer was well content to agree with.

or interest in the ship's working during the period of the requisition. This principle was accepted and applied by Courts of first instance in subsequent cases (x). It is not easy to see why the charterer should have any interest in the hire paid by the Government, if it be remembered (i) that the charter is a contract by which the shipowner during a certain period agrees to do certain work for the charterer, but is not a contract under which the charterer has any interest in the ship (y), except that it is the vehicle with which the shipowner is to do the agreed work; (ii) that by the charter the charterer agrees to pay hire during the agreed period even if the shipowner by reason of restraint of princes is not doing his promised work; and (iii) that the "requisition" meant that the shipowner, under compulsion, agreed to do work for the Government instead of doing work for the charterer (z).

Note 2.—It was not, apparently, in the year 1915 that the question of the effect of requisition upon a time charterparty arose for the first time. *Malynes, Lex Mercatoria* (1686), says at p. 85, "If a Factor do hire a ship by the Month for another Merchant, or for his own account, and ladeth the same being ready to depart; afterwards the King makes a general Embargo or restraint upon all Ships for a time; the Master cannot demand any Freight of the Factor for and during the said time of arrest: And if the Ship be unladen again, and imployed in the King's Service, the Factor is free of all agreements or Covenants with the Master."

Implied contract to proceed without deviation or delay.
(See Articles 99, 100.)

(x) *E.g.*, *Chinese Engineering Co. v. Sale*, (1917) 2 K. B. 599; *London Am. Co. v. Rio Tinto Co.*, (1917) 2 K. B. 611; *Dominion Coal Co. v. Maskinonge Co.*, (1922) 2 K. B. 132.

(y) See *Scrutton, L.J. Elliott Tug Co. v. Shipping Controller*, (1922) 1 K. B. 138; and *Bailhache, J.*, in *Federated Coal Co. v. The King*, (1922) 27 Com. Cas 295; and in *Dominion Coal Co. v. Lord Curzon Co.* (1922), 12 Ll. L. R. 490, especially the last.

(z) Put otherwise, may not the logical result be that, if the charter was not frustrated, the shipowner was entitled to receive and keep hire from the Government and also to receive and keep hire from the charterer? If this be right, the view of the minority in the House of Lords, that the charter was frustrated, would seem to be supported.

Article 31.—Implied Undertaking by Shipper not to ship Dangerous Goods without Notice. -

By the common law of England (a) the shipper of goods impliedly undertakes to ship no goods of such a dangerous character or so dangerously packed, that the shipowner or his agent could not by reasonable knowledge and diligence be aware of their dangerous character, without notice to the shipowner or his agent of such dangerous character; and he is therefore liable to any person who is injured by the shipment of such dangerous goods without notice (b).

Goods may be dangerous within this principle if owing to legal obstacles as to their carriage or discharge they may involve detention of the ship (c).

Unless the shipowner knows, or ought to know, the dangerous character of the goods, there will be an implied warranty by the shipper that the goods are fit for carriage in the ordinary way, and are not dangerous (d).

But when the shipowner or his agent has full opportunities of observing the dangerous character of such goods he is treated as having such notice, and the shipper therefore is not liable (e).

(a) Certain special goods are also dealt with by statutory penalties : see Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, ss. 446—450; see Appendix III. Many bills of lading contain special provisions as to risky or hazardous goods, e.g., glass, specie, &c.

(b) *Brass v. Maitland* (1856), 6 E. & B. 470; *Hutchinson v. Guion* (1858), 5 C. B. N. S. 149; *Williams v. East India Company* (1802), 3 East, 192, at pp. 200, 201; *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; in which see *dictum*, per Willes, J., at p. 563; *Bamfield v. Goole, &c. Transport Co.*, (1910) 2 K. B. 94.

(c) *Mitchell v. Steel*, (1916) 2 K. B. 610.

(d) *Bamfield v. Goole, &c. Transport Co.*, (1910) 2 K. B. 94; *Brass v. Maitland* (*uti supra*). In the dissentient judgment of Crompton J., in *Brass v. Maitland* and in *Acatos v. Burns* (1878), 3 Ex. D. 282, there are various *dicta*, to the effect that the warranty of the shipper is a less extensive one and is limited by the actual knowledge of the shipper as to the danger. See this case discussed in *Bamfield v. Goole, &c. Transport Co.* See also *G. N. Ry. Co. v. L. E. P. Co.*, (1922) 2 K. B. 742.

(e) *Acatos v. Burns* (1878), 3 Ex. D. 282, which seems thus reconcilable with *Brass v. Maitland* and other cases, though some of its *dicta* are more sweeping. See *Bamfield v. Goole, &c. Transport Co.* (*ubi supra*), and see *Greenshields v. Stephens*, (1908) A. C. 431; *Owners of S.S. Sebastian v. de Vizcaya*, (1920) 1 K. B. 332; and *The Domald*, (1920) P. 56.

Note.—It does not appear to have been considered whether if the shipowner contracts to ship specified goods, not ordinary matter of commercial knowledge, without knowing, as the fact is, that they are dangerous to the ship, or to other goods, or likely to infect the ship, he can refuse to take them on learning their character. It would seem that if the danger can be avoided by expense and care, he must take them, but if it cannot be so avoided, he is not bound to carry them.

Case 1.—F. shipped on board A.'s ship sixty casks described as "bleaching powder," apparently sufficiently packed; in fact the powder contained chloride of lime, which corroded the casks, and damaged the rest of the cargo. *Held*, that in the absence of notice to A. of the dangerous character of the goods, F. was liable for the resultant damage, unless the powder was so well known an article that masters of ships ought to know of its dangerous character. F. pleaded that he shipped the goods, packed as he received them from third persons, without negligence. *Held*, by Lord Campbell and Wightman, J., no defence; by Crompton, J., a good defence (*f*).

Case 2.—A., shipowners, received for shipment from F., a quantity of salt cake with permission to stow it in bulk. In ignorance of its nature they stowed it next casks, which corroded, letting out the brine they contained, which damaged the salt cake. F. sued A. for the negligent stowage. *Held*, that proof that F. concealed the dangerous nature of salt cake from A., and that it would not be known to the masters in the ordinary course of business, was a good defence. *Held* also, the mere fact that F. authorised stowage in bulk was no defence, as he did not authorise negligent stowage in bulk (*g*).

Case 3.—F. shipped maize in A.'s ship, apparently in good order and condition; on the voyage it sprouted and was evidently in bad condition and dangerous. The jury found that it was dangerous when shipped, that its state could not have been ascertained by the use of reasonable means, and that the shipowner had full opportunities of examining it. *Held*, that F. was not liable for any damage or delay occasioned by such shipment (*h*).

Case 4.—F. shipped rice on A.'s ship which he had chartered for a voyage to the Piræus. The discharge of rice there could

(*f*) *Brass v. Maitland* (1856), 6 E. & B. 470.

(*g*) *Hutchinson v. Guion* (1858), 5 C. B. N. S. 149.

(*h*) *Acatos v. Burns* (1878), 3 Ex. D. 282. Both shipper and shipowner knew that the cargo was maize, and that in certain circumstances maize was liable to sprout. There was "the clearest notice to the carrier of the nature of the goods he was requested to carry" (*per* Fletcher Moulton, L.J., *Bamfield v. Goole, &c. Co.*, (1910) 2 K. B. at p. 111). *Cf. Greenshields v. Stephens*, (1908) A. C. 431.

only take place with the permission of the British Government. F. knew this; A. did not, and could not reasonably have known it. The ship was delayed in consequence. *Held*, that F. was liable to A. for damages for the delay (i).

(i) *Mitchell v. Steel*, (1916) 2 K. B. 610. Where a cargo of barley was mixed with foreign substances, whereby the action of the grain elevator was impaired, and the discharge delayed, an attempt by the shipowner to extend the doctrine of this case, and claim damages for the delay, was unsuccessful; *Transoceanica v. Shipton*, (1923) 1 K. B. 31.

SECTION IV.

PERFORMANCE OF CONTRACT: LOADING.

Article 32.—Performance of Contract before Loading.

UNDER the contract of affreightment whereby the whole of a ship is hired, contained in a charterparty, the shipowner may have duties to perform before the cargo is loaded; under the contract of affreightment, whereby goods, not a complete cargo, are to be carried, evidenced in a bill of lading only, as the bill of lading is not signed till the goods are shipped, it does not usually provide for anything previous to shipment (a).

Article 33.—Shipowner's Duty under a Charter before Loading: "To proceed to a Port and there Load."

If the chartered voyage is not the same as the carrying voyage, as in a charter "to proceed to a port and there

(a) Where room is engaged for certain goods in a general ship, but the goods are afterwards "shut out" for want of room, the contract of affreightment is *prima facie* broken, and an action will lie against the shipowner.

This is subject to the following remarks:—(1) That many engagements of goods are so indefinite that they could not be held to amount to contracts: though in other cases a formal contract clearly exists, as where the intending shipper makes a note of his goods and sometimes of the rate of freight on the back of one of the ship's shipping cards, and gets it initialled by the shipowner or his broker; (2) That most shipping cards contain a clause—"last day for goods is . . . unless the ship is previously full"; (3) That owing to the general course of business and the great difficulty of proving any damages by "shutting out," such actions, which clearly lie at law, are in practice almost unknown. Extra freight paid for the goods shut out could probably be recovered; see *Featherston v. Wilkinson* (1873), L. R. 8 Ex. 122; and demurrage for railway trucks in which goods shut out were stored has been recovered once in the port of London under special circumstances. Loss of profit on goods shut out cannot usually be recovered; so held by Bigham, J., in an unreported case of *Hecker v. Cunard S.S. Co.* in July, 1898.

load," the shipowner's first duty is to proceed to his port of loading with reasonable speed, and by a fixed day, if such be named in the charter (*b*).

The excepted perils in the charter, though they apply to this preliminary voyage (*c*), do not prevent the application of either of these undertakings, though they may excuse the shipowner for their breach (*d*). •

Case 1.—A ship was chartered on December 28, when lying at U., to proceed forthwith to X., and there load, perils excepted "which may prevent the loading or delivery of the cargoes during the said voyage." Owing to delays caused by excepted perils, the ship did not reach X. till July 28, and the charterers refused to load. The jury found that the delay did not defeat the commercial object of the adventure. *Held*, that "forthwith" meant without unreasonable delay (*e*); that the exceptions in the charter applied to the preliminary voyage to the port of loading, and that the charterers were not justified in throwing up the charter (*f*).

Case 2.—A ship, then at X., was chartered to "proceed to the usual loading-place there, guaranteed for cargo in all October, and there load and proceed to Z.," certain perils being excepted "during the voyage." The vessel broke ground to proceed to the usual place of loading, but was prevented by excepted perils from arriving there till after considerable delay. The charterer did not throw up the charter (*g*), but sued the shipowner for its breach: the shipowner pleaded excepted perils. *Held*, that the transit to

(*b*) *Jackson v. Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125; *Brett, L.J.*, in *Nelson v. Dahl* (1879), 12 Ch. D. pp. 581—584; *McAndrew v. Adams* (1834), 1 Bing. N. C. 29. See also *Barker v. McAndrew* (1865), 18 C. B. N. S. 759; *Harrison v. Garthorne* (1872), 26 L. T. N. S. 508.

(*c*) *Hudson v. Hill* (1874), 43 L. J. C. P. 273; *Bruce v. Nicolopoulos* (1856), 11 Exch. 129.

(*d*) *Smith v. Dart & Son* (1884), 14 Q. B. D. 105; *Harrison v. Garthorne*, *vide supra*. Cf. *The Glenfruin* (1885), 10 P. D. 103, on the relation of excepted perils to implied undertakings.

(*e*) On the meaning of "forthwith," see also *Roberts v. Brett* (1865), 11 H. L. C. 337. Cf. *Forest Oak S.S. Co. v. Richards* (1899), 5 Com. Cases, 100, where the words "to proceed immediately" were held to allow the ship to go to a coaling-port first.

(*f*) *Hudson v. Hill* (1874), *vide supra*. The ship made her outward voyage by Rio, which ordinarily would be a breach entitling the charterer to throw up the charter (*McAndrew v. Adams* (1834), 1 Bing. N. C. 29), but was allowed by a special clause in the charter. The findings of the jury were contradictory and unsatisfactory, and, if the sugar season was over, it is difficult to reconcile some remarks of Brett, J., with the present law. If the jury had found commercial frustration the charterers could have thrown up the charter, but the shipowner would have been protected from an action by the exceptions.

(*g*) See *Nickoll v. Ashton*, (1901) 2 K. B. 126 (C. A.).

the place of loading was part of the voyage; that the excepted perils applied to it and that the charterer could not succeed (*h*).

Case 3.—A ship was chartered to go to X. and there load and proceed to Z., certain perils being excepted; "should the ship not be arrived at X. free of pratique and ready to load on or before December 15, charterers to have the option of cancelling charter." Through excepted perils the ship was not free of pratique and ready to load on December 15. *Held*, that the clause as to excepted perils did not apply to the cancelling clause, and that the charterers could therefore throw up the charter (*i*).

Note.—The port to which the ship is to proceed may be named in the charter, in which case the ship is bound to go there, the shipowner being usually protected by the clause "or as near as she can safely get"; or it may be left to the charterer to name, being "a port as ordered,"—the shipowner being sometimes protected by its description as a "safe port."

Where there is a cancelling clause, and the ship cannot get to the port of loading by her cancelling date, she is yet bound to proceed, unless the delay by excepted perils is such as to put an end to the charter (*j*). It was first held in America that the shipowner cannot, when the cancelling date is past, call upon the charterer to declare whether he will load the vessel or not (*k*); and the English Courts in *Moel Tryvan (Owners) v. Weir (l)*, came to the same conclusion (*m*). In practice the charterer usually refuses an answer, when freights have fallen, in the hope of making a new bargain with the shipowner under pressure. The shipowner may defeat this manœuvre by refusing to proceed, whereupon the charterer will in all likelihood be unable to prove any damages. And where, the charterer having refused to declare what he would do and the shipowner

(*h*) *Barker v. McAndrew* (1865), 18 C. B. N. S. 759. Willes, J., in his judgment distinguishes *Crow v. Falk* (1846), 8 Q. B. 467, and *Valente v. Gibbs* (1859), 6 C. B. N. S. 270, as cases where there was no preliminary voyage, and the delay therefore arose before the "voyage" began; but some *dicta* of Cockburn, C.J., in the latter case seem to go too far in the present state of the authorities. In *The Carron Park* (1890), 15 P. D. 203, Sir J. Hannen followed *Barker v. McAndrew*, and declined to follow *Crow v. Falk*.

(*i*) *Smith v. Dart* (1884), 14 Q. B. D. 105.

(*j*) *Shubrick v. Salmond* (1765), 3 Burrows, 1637.

(*k*) *The Progreso* (1892), 50 Fed. Rep. 835.

(*l*) (1910) 2 K. B. 844.

(*m*) An express clause is sometimes inserted in a charter whereby the shipowner on arrival of the cancelling date can call upon the charterer to elect whether he will cancel or not. Cf. *Bank Line v. Capel*, (1919) A. C. 435.

having refused to proceed, the charterer applied to the Court for an injunction to restrain the shipowner from using the ship for any purposes other than those of the charter (*i.e.* to compel the shipowner to proceed) the Court refused his application, leaving him to his remedy in damages, if any (*n*).

The exercise by the charterer of his right to cancel does not necessarily debar him from asserting a claim for damages against the shipowner for failure to send the ship to load (*o*).

Article 34.—“To proceed to a safe Port.”

A “safe port” (*p*) means not only a port naturally safe, or a port into which the vessel can go safely as a laden ship, without danger from physical causes (*q*), but also one into which she and her cargo can go without danger from political causes (*r*).

Dangers likely to be incurred on the voyage to a port may be taken into account in deciding whether such port is a safe port (*s*).

A port is not necessarily a “safe port” because at the moment when the vessel gets to it, and in the weather then prevailing, she can get into it with safety (*t*).

The port must not only be safe when the ship is ordered to it, but also safe when the ship arrives at it (*u*). If the port is not safe at the time of order, the shipowner

(*n*) *Bucknall v. Tatem* (1900), 83 L. T. 121.

(*o*) *Nelson v. Dundee East Coast S.S. Co.* (Sc. (1907), Sess. Cas. 927).

(*p*) As to the meaning of “a usual port” or “a usual safe port,” see *Robert Dollar Co. v. Blood Holman & Co.*, (1920) 4 Ll. L. Rep. 343, in which case all the authorities referred to in this article are reviewed by McCardie, J.

(*q*) *The Alhambra* (1881), 6 P. D. 68; *Reynolds v. Tomlinson*, (1896) 1 Q. B. 586. But if the ship can get there safely loaded, it seems to be immaterial that before her discharge is completed, owing to neap tides, she will take the ground. See *Carlton S.S. Co. v. Castle Mail Co.*, (1898) A. C. 486. See also Article 37.

(*r*) *The Teutonia* (1872), L. R. 4 P. C. 171, at pp. 181, 182; *Ogden v. Graham* (1861), 1 B. & S. 773; *Palace Co. v. Gans Line*, (1916) 1 K. B. 138.

(*s*) *Palace Co. v. Gans Line*, (1916) 1 K. B. 138.

(*t*) *Johnston v. Saxon Queen Co.* (1913), 108 L. T. 564.

(*u*) *The Teutonia* (1872), L. R. 4 P. C. 171.

may refuse to start for it (*v*); if it becomes unsafe before arrival there, he may require another port to be named (*u*).

Whether a port is a "safe port" is in each case a question of fact and of degree (*s*).

Case.—A German vessel was chartered to proceed to Y., "where she shall receive orders from charterer's agent within three days of arrival to proceed to any one safe port in Great Britain or on the Continent between Havre and Hamburg"; at Y. the ship was ordered to Dunkirk, then a safe port; before reaching Dunkirk war broke out between France and Germany, rendering it unsafe for the ship to enter Dunkirk; she therefore proceeded to Dover. *Held*, that the shipowner was entitled to call upon the charterer at Dover to name a safe port for delivery, and, failing his doing so, was entitled to full freight at Dover (*t*).

Article 35.—"To proceed to a Port as ordered."

Where a ship is chartered to proceed to a "port as ordered," the master is bound to wait a reasonable time for such orders, but need not, in the absence of express stipulation, communicate with the charterers. If he receives no orders within a time commercially reasonable, he may either proceed to such a place as a prudent man would think most to the charterer's advantage, or may throw up the charter (*x*).

If the ship is to proceed to a port of call for orders as to a port of discharge, and if at the port of call the charterer will only name a port which is impossible of access, he commits a breach of contract, and the shipowner, on discharging the goods at the port of call, if that is a reasonable place for such discharge, can claim freight under a *quantum meruit* (*y*), and also damages for any detention of the ship at the port of call due to the charterer's refusal to nominate a proper port (*y*).

(*v*) *The Alhambra* (1881), 6 P. D. 68.

(*x*) *Sieveling v. Maas* (1856), 6 E. & B. 670; *Woolley v. Reddelien* (1843), 5 M. & G. 316; *Rae v. Hackett* (1844), 12 M. & W. 724.

(*y*) *Aktieselskabet Olivabank v. Dansk Fabrik*, (1919) 2 K. B. 162. See pp. 375, 376, *infra*. In the above case the shipowner was apparently held entitled to recover the whole charterparty freight upon his *quantum meruit*.

Note.—In practice the master always does inform the charterers of his arrival, and there is usually an express stipulation to that effect in the charter: *e.g.* “to call at Y. for orders to be forwarded within forty-eight hours after notice of her arrival has been given to and received by charterer’s agents in London or lay-days to count.”

Case.—A ship was chartered to proceed to X., and there load timber “to a coal port or a good and safe port on the Firth of Forth, or to London, or to a good and safe port on the east coast of Great Britain as ordered at Y.” She loaded at X. and proceeded to Y. for orders; she received no orders there, so, after waiting a reasonable time, proceeded to Leith, “a good and safe port on the Firth of Forth,” and then discharged. *Held*, that in the absence of orders the master was justified in proceeding after a reasonable time, and was not bound to communicate with the charterers; that in such a case he should [might?] go to the place to which he thought it would be most to the advantage of the charterer to go (z).

Article 36.—“*So near as she can safely get.*”

A ship chartered to load or unload at a named port or dock or berth, “or so near as she can safely get,” if prevented on her arrival from reaching the place of loading or unloading, is bound to wait a reasonable time before adopting the alternative place of loading or discharge, if by so waiting she can get to the port or dock or berth named for loading or unloading (a).

This reasonable time will be fixed by commercial considerations, and by the nature of the voyage in which the ship is engaged (b). Thus in tidal rivers or harbours

(z) *Sieeking v. Maas*, *vide supra*. Lord Campbell’s remarks in this case seem inconsistent with *Rae v. Hackett*, *vide supra*, where charterer’s failure to name a port was held to justify the shipowners in proceeding; but there the port to be named was the port of loading, in this case, the port of discharging; and all it was necessary to decide was that the shipowner was not liable to an action for proceeding without orders. We have, however, altered Lord Campbell’s “should” to “might,” to cover the two cases.

(a) *Dahl v. Nelson* (1881), L. R. 6 App. C. 38. See also *Nelson v. Dahl* (1879), 12 Ch. D. 568, especially at p. 591.

(b) *Per* Lord Blackburn, 6 App. C. p. 54: “What would be the effect on the object of the contract, and the damage to each party caused by the delay?” *Per* Brett, L.J., 12 Ch. D. p. 593: “Notice must be taken of what the particular adventure in each case is.”

she is usually bound to wait till ordinary spring tides (*c*); in icebound rivers or seas, till the ice melts (*d*); in case of delay by fulness of docks, a time reasonable from a commercial point of view (*e*).

If wholly unexpected circumstances, such as a war or a blockade, intervene, the clause will not entitle the master to deliver at the nearest safe port and so to claim his freight, though such a course may be a reasonable one for him to take (*f*).

Case 1.—A ship was chartered to proceed “to the Z. Docks, or so near thereto as she can safely get.” She reached the dock gates on August 4; but the docks were quite full, though application had been made on the ship’s behalf on July 16, and at least five weeks would elapse before the ship could be discharged. *Held*, that the shipowner was bound to wait a reasonable time to go into the docks, but that if he could only go in by waiting an unreasonable time, he was entitled to call upon the charterer to take delivery outside the dock gates at charterer’s expense. *Held*, also, that the delay required to enter the docks in this case was unreasonable (*g*).

Case 2.—A ship was chartered to proceed to a berth within certain limits in the port of Plymouth, or “as near as she could safely get.” She could not at neap tides get to the berth named, but could at spring tides. She arrived at neap tides. *Held*, that

(*c*) *Parker v. Winlow* (1857), 7 E. & B. 942; *Bastifell v. Lloyd* (1862), 1 H. & C. 388; *Schilizzi v. Derry* (1855), 4 E. & B. 873. *Cf. The Curfew*, (1891) P. 131. It apparently will not alter the case if the low tides occur in the middle of the ship’s loading time, so that she has to go away and return to complete her loading. *Carlton S.S. Co. v. Castle Mail Co.*, (1898) A. C. 486.

(*d*) *Schilizzi v. Derry*, (1855) 4 E. & B. 873, at p. 886; *Metcalfe v. Britannia Iron Works* (1877), 2 Q. B. D. 423; and see *per Brett, L.J.*, 12 Ch. D. at p. 593.

(*e*) *Dahl v. Nelson* (1881), 6 App. C. 38.

(*f*) *Castel Latta v. Trechman* (1884), 1 C. & E. 276. *Cf. St. Enoch Co. v. Phosphate Co.*, (1916) 2 K. B. 624. But this is now frequently provided for by express clauses. See *Nobel v. Jenkins*, (1896) 2 Q. B. 326, and *Note*, p. 127. But if there is no prospect of the removal of the obstacle within a reasonable time, the master or shipowner can throw up the contract: *Geipel v. Smith* (1872), L. R. 7 Q. B. 404. In that case he will still have the duty of providing for the cargo in the way most beneficial to its owner (see Articles 95, 101), and he will be entitled to recover any expenses incurred in so doing: *Cargo ex Argos* (1873), L. R. 5 P. C. 134, and Articles 101, 138, *post*. What is the nearest safe port must be a question of fact in each case; *cf. East Asiatic Co. v. Tronto Co.* (1915), 31 T. L. R. 548. It does not, of course, follow that the nearest safe port, though possibly the most convenient to the shipowner, is the port most beneficial to the cargo-owner.

(*g*) *Dahl v. Nelson* (1881), 6 App. C. 38.

she must wait till spring tides; the delay by tides in a tidal harbour being in the ordinary and regular course of navigation (*h*).

Case 3.—Ship chartered, "to Galatz, or so near thereto as she should safely get." She reached the mouth of the Danube, ninety-five miles from G., on November 5, but there was not then enough water to enable her to cross the bar; she remained there till December 11, when the anchorage was no longer safe, and she accordingly proceeded to Odessa, the nearest safe port. There was water enough on the bar on January 7. *Held*, there had been no performance of the charter; the rising of the Danube at the beginning of the year being a well-known incident in Danube navigation, the master was bound to wait. The vessel was bound to get within the ambit of the port before discharging, though she might not reach the actual harbour (*i*).

Case 4.—Charter "to Taganrog, or so near as she could safely get and deliver the cargo afloat." On arriving at Kertch, three hundred miles by sea, seven hundred by land, from T., the ship was prevented by ice from entering the Sea of Azof. She claimed under the clause to deliver at Kertch. *Held*, this was not a delivery under the charter, the obstruction being only temporary, and such as must be incident in every voyage to a frozen sea (*j*).

Case 5.—Charter "to Taganrog, or so near as she may safely get." Owing to Turkish blockade the ship was unable to reach T., and accordingly proceeded to Constantinople, the nearest safe port, and claimed to deliver her cargo there. *Held*, not a delivery under the charter, the clause being intended to meet the case of the ship not being able absolutely to get to the very place or dock stipulated, but not enabling the vessel to go to any port to which under the circumstances it is a reasonable course for the master to go (*k*).

Note.—The question of the disposition of the cargo on bills of lading or charters, where the vessel is prevented from reaching her port of destination, is now often dealt with by clauses of this kind:—"In case of the blockade or interdict of the port of destination, or if without such blockade or interdict the entering of the port of discharge should be considered unsafe by reason of war, infectious disorder, quarantine disturbances, ice, or from any other

(*h*) *Parker v. Winlow* (1857), 7 E. & B. 942. See also *Bastifell v. Lloyd* (1862), 1 H. & C. 388. *Per* Bramwell, B., "it would be different if there were only one or two tides in the year."

(*i*) *Schilizzi v. Derry* (1855), 4 E. & B. 873. Lord Campbell, p. 886, compared detention by insufficient water to detention by ice.

(*j*) *Metcalfe v. Britannia Iron Works* (C. A.) (1877), 2 Q. B. D. 423. It is doubtful whether the conclusion of fact here would now be arrived at.

(*k*) *Castel v. Trechman* (1884), 1 C. & E. 276 (Stephen, J.), see note (*f*), *ante*, p. 126.

cause (l), the master to have the option of landing the goods at any other port he may consider safe, at shipper's risk and expense, when the ship's responsibility shall cease"; or:—"when the navigation of the continental ports is obstructed by ice (m), the goods to be landed at the nearest available port at the risk and expense of the consignor, such delivery being considered final"; or:—"should hostilities render it unsafe for the steamer or her cargo to proceed to the port of destination, she has liberty to discharge her cargo at any near available port, and there end her voyage, giving shippers due notice of such fact."

This power is sometimes given the master "in case of apprehension of such prevention, or in case of war or hostilities rendering the further prosecution of the voyage in the opinion of the master (m) or owners unsafe." Without such clauses as these, though the master might delay or deviate to avoid danger, he could not land the goods or give up the intention of proceeding to the original port of destination, at any rate till such delay had ensued as to defeat the commercial purpose of the adventure; *semble*, even then he would not be entitled to freight; though he might be entitled to the expenses of delivery. (See Articles 138, 139, 143.)

Article 37.—"Safely."

"Safely" means "safely, as a laden ship" (n). The ship therefore is not bound to load part of her cargo in the port, and then take on board outside the port the part of the cargo she could not safely load in port (o).

(l) To which phrase the doctrine of *ejusdem generis* must be applied. *Knutsford v. Tillmans*, (1908) App. Cas. 406.

(m) "Obstruction" or "inaccessibility" in such a clause must arise from obstacles that prevent the port being reached except after inordinate delay. And the "opinion of the master" must be justified by the facts. Where on a voyage from England to Vladivostock the ship was delayed for three days by ice, upon which the master went to Nagasaki, but just after he turned back the ice cleared away so that ships could get into Vladivostock, it was held that the shipowners were not protected under the clause "Should a port be inaccessible on account of ice . . . or should entry at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge at some other safe port." *Knutsford v. Tillmans*, (1908) App. Cas. 406.

(n) *Shield v. Wilkins* (1850), 5 Ex. 304.

(o) *The Alhambra* (1881), 6 P. D. 68 (C. A.). *Shield v. Wilkins* (1850), 5 Ex. 304. See also *Hayton v. Irwin* (1879), 5 C. P. D. 130

Neither is she bound to unload before reaching the port, to enable herself to proceed to a port she could not reach in safety at her laden draught of water (*p*).

If the ship is to load in a tidal harbour, or a river with a bar, and her loading is being completed at neap tides, the captain is not entitled to sail with less than a full cargo, though that is all with which at the then state of the tides he can get out: he must complete his cargo and wait for the spring tide that will enable him to leave (*q*).

Case 1.—A ship was chartered “to a safe port as ordered, or as near thereto as she can safely get, and always lie and discharge afloat.” The ship was ordered to Lowestoft, where the vessel could not “lie always afloat,” without previously discharging some of her cargo outside the port. *Held*, that the shipowner was not bound to go to such a port, but only to one where the vessel on her laden draught of water could always lie afloat safely (*r*).

Case 2.—A ship was chartered to X., “or so near thereto as she can safely get.” X. is a bar-harbour; the ship was loaded inside the bar as deep as the water on the bar would allow, and the charterer then required her to complete her loading at her own expense outside the bar. *Held*, that the ship was not required by the charter to do so, for she could not be said to “safely get” to a place from which she could not safely get away with a full cargo, and her going inside the bar was therefore only for the charterer’s accommodation. According to the terms of the charter, she need not have crossed the bar at all (*s*).

(C. A.). She may in a tidal harbour be bound, after commencing loading on one spring tide, to wait until the next spring tide to complete it. *Carlton S.S. Co. v. Castle Mail Co.*, (1898) A. C. 486.

(*p*) *Shield v. Wilkins*, *vide supra*; *Erasmus Treglia v. Smith’s Timber Co.* (1896), 1 Com. Cases, 360, a charter to discharge at Sutton Bridge; *Reynolds v. Tomlinson*, (1896) 1 Q. B. 586 (Gloucester and Sharpness); *Hall v. Paul* (1914), 19 Com. Cas. 384 (King’s Lynn).

(*q*) *Gifford v. Dishington* (1871), 9 Sess. Cas. (3rd Ser.) 1045; *cf. The Curfew*, (1891) P. 131.

(*r*) *The Alhambra*, *vide supra*.

(*s*) *Shield v. Wilkins*, *vide supra*. If she had not crossed the bar, the charterer must have borne the expense of loading outside by lighters: *Trinidad v. Levy* (1860), 2 F. & F. 441; but if, having gone inside, she had loaded a full cargo, and been obliged to unload to get out, she must have paid the expense of loading outside, and must carry the full cargo to earn her freight. *General Steam Navigation Co. v. Slipper* (1862), 11 C. B. N. S. 493. Where a vessel chartered to load always afloat in a dock could do so, but could not leave the dock except at spring tides:—*Held*, that she was bound to load in the dock and wait for spring tides, and was not entitled to go to another dock when partly loaded and require the charterers to lighter her cargo to her. *The Curfew*, (1891) P. 131.

Case 3.—A vessel was chartered to proceed “to a safe port, or as near thereto as she can safely get, and deliver same . . . to discharge as customary with all possible dispatch, cargo to be taken from alongside ship at merchant’s risk and expense.” She was ordered to Z., but could get no nearer than Y. The shipowner claimed to deliver enough at Y. to lighten his vessel, at charterer’s expense; the charterer set up a custom at the port of Z. that the ship must get to Z. at her own expense. *Held*, that the custom was inconsistent with the contract, and the charterer must pay the expense of lightening (t).

Note 1.—*At all times of the tide and always afloat.*—This clause will relieve the ship of the duty of waiting in a tidal river or harbour till the tide serve her to proceed to the dock or wharf where she is to discharge: under it the charterer will be required to name a loading or discharging berth, where she can lie “always afloat at all times of the tide.” The clause “always afloat” alone will not justify a vessel in declining to go to a berth where she cannot lie continuously always afloat, if she can do so partly before and partly after neap tides (u). So where the ship is chartered “to load as customary always afloat at such wharf or anchorage as the charterers may direct,” and the charterers direct her to a wharf where she can load part of her cargo afloat, but will afterwards require to load the rest of her cargo from lighters at an anchorage (that being a customary method of loading in the port), the charterers commit no breach of the charter (v).

Case.—A ship was chartered to Z., “or so near thereto as she may safely get, at all times of tide and always afloat.” She arrived at Y. on September 5, but the tides would not allow her to proceed to Z., “always afloat,” till September 9. *Held*, that the vessel had “arrived at Z.,” for purposes of demurrage, on

(t) *Hayton v. Irwin* (1879), 5 C. P. D. 130. There was no express decision that the ship was bound to proceed to Z. after lightening. It is submitted that she was not, if Y. was outside the port of Z. (*The Alhambra* (1881), 6 P. D. 68), and if Y. was in the port of Z. the lay-days would begin to count from her readiness to unload at Y., in the absence of any custom of the port. *Nielsen v. Wait* (1885), 16 Q. B. D. 67.

(u) *Carlton S.S. Co. v. Castle Co.*, (1898) A. C. 486. In that case, however, the ship was chartered to load in Senhouse Dock. The Superior Courts did not say what was to happen to her during the time when she would have taken the ground if she stayed in the dock; and it is doubtful whether the decision would apply to a case where “a safe berth” was to be named. Perhaps the ship must wait outside till after the first neap tides.

(v) *Aktieselskabet Inglewood v. Millar* (1903), 8 Com. Cas. 196.

September 5 (x). If chartered "to load *always* afloat," and she is ordered to a berth where she can always lie afloat, but which she can only get to and from at certain times of tides, she is bound to wait for suitable tides (y).

Note 2.—A dock as ordered on arriving, if sufficient Water.

Case.—A ship was chartered to proceed to Z. to discharge in "a dock as ordered on arriving, if sufficient water, or so near thereto as she may safely get, always afloat." On arriving at Z. she was ordered to the C. dock, but there was not for four weeks sufficient water in the C. dock. *Held*, that there must be "sufficient water" in the dock when the order is given, and that, if there is not, the ship is not bound to discharge in the dock named (z).

Note 3.—The Scots cases *Hillstrom v. Gibson* (a) and *Dickinson v. Martini* (b), which follows *Hillstrom v. Gibson*, and certain *dicta* in the English cases of *Capper v. Wallace* (c) and *Nielsen v. Wait* (d), cannot be accepted as sound. They are inconsistent with the decision in *The Alhambra* (e) and subsequent cases in which *The Alhambra* has been followed.

The Alhambra in effect decides that where the ship is to go to "a safe port," it must be a port to which she can go as a loaded ship, and the master is not bound to discharge part of his cargo short of the destination, in order, with a lighter draft, to get to that destination and discharge the remainder. *Hillstrom v. Gibson* and *Dickinson v. Martini* are inconsistent with this. In *Capper v. Wallace* (f) (decided the year before *The Alhambra*) the Court, on the authority of *Hillstrom v. Gibson*, say that it is the duty of the master so to lighten his ship. In *Nielsen v. Wait* (g) (in which *The Alhambra* was not cited) there is a *dictum* of Pollock, B., based upon *Hillstrom v. Gibson*, to the same effect.

(x) *Horsley v. Price* (1882), 11 Q. B. D. 244. Without the clause "at all times of the tide," the ship must have waited at her own expense till the 9th: *Parker v. Winlow* (1857), 7 E. & B. 942.

(y) *The Curfew*, (1891) P. 131; see note (s), *supra*, p. 129.

(z) *Allen v. Coltart* (1883), 11 Q. B. D. 782.

(a) (1874), 8 Sess. Cas., 3rd Ser. 463.

(b) (1874), 1 Sess. Cas., 4th Ser. 1185.

(c) (1880), 5 Q. B. D. 163.

(d) (1858), 14 Q. B. D. 516.

(e) (1881), 6 P. D. 68.

(f) 5 Q. B. D. at p. 166.

(g) 14 Q. B. D. at pp. 522, 523.

The Alhambra has since been followed and approved in several English cases, viz.: *Reynolds v. Tomlinson* (h), *Erasmus Treglia v. Smith's Timber Co.* (i), and in *Hall Brothers v. Paul* (j), and the principle it lays down may now be considered as firmly established (k).

Article 38.—Loading under a Charter.—Duty of Shipowner.

At the port of loading the rights of the shipowner and the obligations of the charterer as regards loading the cargo depend on the following facts:—

(1) The ship must be at the place where she is bound to be ready for cargo (Article 39), or, if there is the provision in the charter, and the circumstances justify its application, "so near thereto as she can safely get." (Articles 36, 37, 39.)

(2) The ship must be, so far as she is concerned, ready to load. (Article 40.)

(3) The charterer must have notice of the above facts. (Article 41.)

When these conditions are fulfilled the vessel is "an arrived ship," and the lay-days, or days allowed the ship for loading, begin (l).

In some cases upon the happening of the above three events the charterer will also be bound to load the cargo.

(h) (1896) 1 Q. B. 586.

(i) (1896), 1 Com. Cas. 360.

(j) (1914), 19 Com. Cas. 384. Sankey, J., there expressly disapproves of *Hillstrom v. Gibson* and the dicta in *Copper v. Wallace*, and in *Nielsen v. Wait*.

(k) In the first seven editions of this work the conflict of these cases was discussed in much greater detail in the equivalent of this Note. In view of the repeated affirmation of the principle of *The Alhambra*, the elaboration of the point seems no longer necessary.

(l) By express provision of the charter the lay-days for loading or discharging may begin at some arbitrarily selected point, e.g., "when the vessel is reported at the Custom House," *Horsley Line v. Roechling* (Sc. (1908), Sess. Cas. 866). Cf. *Northfield v. Compagnie des Gaz*, (1912) 1 K. B. 434. "Reporting day," which is commonly referred to in such clauses (e.g., "reporting day not to count"), refers to the entry of the ship at the Customs. Unless justified as an exception to the rule upon its special facts, *Larrinaga v. Green* (1916), 2 Ir. Rep. 126, seems to be wrong as to this.

In other cases the charterer will be bound to load the cargo only when:—

(4) The ship is at the place at which the charterer is bound to load the cargo. (Article 39.)

In other words, of the above events (1) may coincide with (4), or may precede it.

The above principles as to the rights and obligations as to loading at the port of loading are the same as regards discharge at the port or place of discharge *except* that (3) "Notice of readiness" is not necessary at the port of discharge. (See Article 124.)

*Article 39.—Where the ship must be ready to load.—
Where the charterer is bound to load.*

As mentioned in Article 38, one must distinguish (1):—the place at which the ship becomes an "arrived ship" under the charter, so that her lay-days begin, from (2):—the place at which the charterer is bound to put the cargo on board the ship.

These two points depend in every case upon the terms of the charter. They may coincide, or the first may precede the second, as appears below (*m*).

I. If the charter is to proceed to a specified and actual "loading spot" (*n*), *i.e.*, a named wharf, or a specific berth, at a quay, or within a dock, then (1):—the ship will only be an "arrived ship" when she gets to the named "spot," and (2):—the charterer will only be bound to load the ship when she gets to the named spot: (*i.e.*, the two points coincide) (*o*).

(*m*) The leading cases on this topic are *Nelson v. Dahl* (1879), 12 Ch. D. 568, and *Leonis Co. v. Rank*, (1908) 1 K. B. 499.

(*n*) Cf. Kennedy, L.J., as to this phrase, *Leonis Co. v. Rank* (*ubi supra*), at p. 521.

(*o*) Brett, L.J., *Nelson v. Dahl* (*ubi supra*), at pp. 581, 582, 584; *Strahan v. Gabriel* (not reported, cited 12 Ch. D. at p. 590); *Watson v. Borner* (1900), 5 Com. Cas. 377. Mere arrival in fact at the berth is not enough; the ship must be there by permission of the authorities, if any, and of right, *Good v. Isaacs*, (1892), 2 Q. B. 555. Cf. *Hull S.S. Co. v. Lamport* (1907), 23 T. L. R. 445, where the ship was prepared

The position is the same if the charter is to proceed to a wharf or quay or berth, "to be named by the charterer," the effect of this provision being as if the berth "named" was actually specified in the charter (p).

II. If the charter is to proceed to a named dock (i.e. an area containing several possible "loading spots"), or to a dock "as ordered" or "to be named" (q), then (1):—the ship will, in the absence of any custom of the port regulating the matter, be an "arrived" ship when she gets inside the specified dock and is, so far as she is concerned, ready to load (r), but (2):—the charterer will

to go to the named berth, and it was vacant, but the authorities would not allow her to go to it by reason of part of the cargo consisting of explosives. The charterers were liable for the cost of lighterage to the named berth.

(p) *Tharsis v. Morel*, (1891) 2 Q. B. 647; *Murphy v. Coffin* (1888), 12 Q. B. D. 87; *Good v. Isaacs*, (1892) 2 Q. B. 555; *Bulman v. Fenwick*, (1894) 1 Q. B. 179; *Modesto v. Dupre* (1902), 7 Com. Cas. 105; *Aktieselskabet Inglewood v. Millar's*, (1903), 8 Com. Cas. 196. Cf. *Hull S.S. Co. v. Lamport* (1907), 23 T. L. R. 445, where the berth "to be named" under the charter was named in the bill of lading. *Parker v. Winlow* (1857), 7 E. & B. 942, if rightly decided, must have fallen within this principle. See *Leonis Co. v. Rank*, (1908) 1 K. B. at p. 514. *The Curisbrook* (1890), 15 P. D. 98, was wrongly decided and is overruled by *Tharsis Co. v. Morel* (ubi supra). Where the charterer is to "proceed to a ready quay berth as ordered," the charterer will on the ship's arrival be bound to name a berth then ready for loading, and will be liable for damages for delay in doing so; *Harris v. Marcus Jacobs* (1885), 15 Q. B. D. 247. As to damages for not loading "in regular turn," see *Jones v. Adamson* (1876), 1 Ex. D. 60; *Taylor v. Clay* (1846), 9 Q. B. 713.

(q) *Tapscott v. Balfour* (1872), L. R. 8 C. P. 46. It is "precisely as if that dock had been expressly named in the charter originally," *ibid.* at p. 52. Cf. *Norden S.S. Co. v. Dempsey* (1876), 1 C. P. D. 654, at p. 655.

(r) *Tapscott v. Balfour* (ubi supra); *Randall v. Lynch* (1810), 2 Carr. 352; *Brett, L.J., Nelson v. Dahl* (1879), 12 Ch. D. 568, at pp. 581, 582, 584. *Davies v. McVeagh* (1879), 4 Ex. D. 265, if rightly decided, must be under this principle. See *Brett, L.J., 12 Ch. D.* at p. 590. In *Monsen v. McFarlane*, (1895) 2 Q. B. 562, the charter was "to proceed to a customary loading place in the — Dock as required by charterers." If this had stood alone the case would have fallen under I. above and been governed by *Tharsis Co. v. Morel* (ubi supra). But the charter went on "to be loaded as per colliery guarantee." By the colliery guarantee the undertaking was "to load in fifteen days after the ship is ready in dock at G." It was held that the guarantee was incorporated, that the ship was therefore to be "ready in dock," and the case was governed by the principle of *Tapscott v. Balfour* (ubi supra). See also *Thorman v. Dowgate S.S. Co.*, (1910) 1 K. B. 410, in which *Monsen v. McFarlane* was followed and *Shamrock S.S. Co. v. Storey* (1898), 4 Com. Cas. 80, distinguished.

be entitled to select the actual berth at which he will load the ship and he is not bound to load her till she gets there (*s*).

In this case the two points do not coincide (*t*). But in such a case by the custom of the port the ship may not be an "arrived" ship until she has got, not merely into the area of the named dock, but also into a berth where loading can take place within that dock (*u*).

III. The same rule applies, *mutatis mutandis*, where the charter is to proceed to a "port," or to "a port as ordered" (*v*), or other area larger than the "dock" dealt with in II. In the same way (1):—the ship is, subject to the effect of custom, an arrived ship when she gets within the named port or area (*x*), and (2):—the charterer can select the actual berth or "loading spot" at which he is to do the loading (*y*).

But as the area of a "port" is vague (*z*), the application of this rule is subject to the limitation that it is not

(*s*) *The Felix* (1868), L. R. 2 A. & E. 273. That the charterer has this right to select the actual loading berth does not have the same result as if the charter was expressly "to proceed to a berth as selected by the charterer" (see above under I.); see *Leonis Co. v. Rank*, (1908), 1 K. B. at pp. 515, 516. *Sanders v. Jenkins*, (1897) 1 Q. B. 93, seems to have been wrongly decided upon an assumption to the contrary of this.

(*t*) They might, if the dock were so small a basin that to be inside it would be to be alongside the only berth within it.

(*u*) *Norden S.S. Co. v. Dempsey* (1876), 1 C. P. D. 654. It is possible that under such a custom the two points still would not coincide, e.g., the ship may by the custom be "arrived" by getting into some proper berth within the dock, but the charterer may desire and require her to load at another. This point does not seem to have arisen.

(*v*) *Brown v. Johnson* (1842), 10 M. & W. 331; *Thijs v. Byers* (1876), 1 Q. B. D. 244.

(*x*) *Leonis Co. v. Rank*, (1908) 1 K. B. 499; *Pyman v. Dreyfus* (1889), 24 Q. B. D. 152; *Jacques v. Wilson* (1890), 7 T. L. R. 119. See also *Brown v. Johnson* (1842), Car. & M. 440, for a complicated question (left to the jury) as to what was the selected port for loading. By the express terms of the charter the time for loading may begin at an arbitrary point without regard to the rules here laid down. Thus where the ship was "to proceed to Savona—and there deliver—time to discharge to begin on being reported at custom house," it was held that the time began on reporting at custom house, even though the ship at that time was not yet within the limits of the port of Savona. *Horsley Line v. Roechling*, Sc. (1908), Sess. Cas. 866.

(*y*) *The Felix* (1868), L. R. 2 A. & E. 273; *Pyman v. Dreyfus* (supra); *The Mary Thomas* (1896), 12 T. L. R. 511.

(*z*) "For instance Gravesend is part of the port of London," per Lord Abinger, *Brown v. Johnson* (1842), 10 M. & W. at p. 334.

enough to make her "arrived" for the ship to have got merely into the legal or fiscal limits of the port. She must have got to that part, or some part, of the port, in which the loading of vessels does take place, *i.e.* she must in a business sense have got to the port as a place where she is to be loaded (*a*).

And again the custom of the port may prevent her from being an "arrived" ship when she is merely within the port in its business sense (*b*). It may by custom be necessary for her to have arrived in some particular part (*c*), or in a dock (*d*), or in some particular dock (*e*), within the port.

Where the charter provides that the ship shall proceed to a berth, or dock, or port, "or so near thereto as she can safely get," the point where the ship becomes "an arrived ship" in each of the foregoing three cases may not be the actual named point but the substituted point "near thereto" under the provision (*f*). The circumstances in

(*a*) Brett, L.J., *Nelson v. Dahl*, 12 Ch. D. at p. 582—"If a larger port be named the usual place in it at which loading ships lie." Cf. *Cargo ex Argos* (1873), L. R. 5 P. C. at p. 160; and cf. Kennedy, L.J., *Leonis Co. v. Rank*, (1908) 1 K. B. at p. 519. See also *La Cour v. Donaldson* (1874), 1 Sc. Sess. Cas., 4th Ser. 912; *Bremner v. Burrell* (1877), 4 Sc. Sess. Cas., 4th Ser. 934; *Caffarini v. Walker* (1876), Ir. Rep. 10 C. L. 250; *M'Intosh v. Sinclair* (1877), Ir. Rep. 11 C. L. 456.

(*b*) "It may . . . be open to a charterer to prove . . . that there is a recognised and established custom of the port not to treat a ship as an arrived ship until she reaches a particular spot." *Per* Kennedy, L.J., *Leonis Co. v. Rank*, (1908) 1 K. B. at p. 520. Proof as regards a foreign port of the rules of the law of the country as a whole, differing from the English law as to an arrived ship, will not suffice to support an allegation of such a custom: *Anglo-Hellenic Co. v. Dreyfus* (1913), 108 L. T. 36.

(*c*) *Brereton v. Chapman* (1831), 7 Bing. 559; *Kell v. Anderson* (1842), 10 M. & W. 498; *This v. Byers* (1876), 1 Q. B. D. 244.

(*d*) *Brown v. Johnson* (1842), 10 M. & W. 331. In that case "it must have been assumed or proved that the usual place of unloading ships in the port of Hull was in a dock," Brett, L.J., *Nelson v. Dahl*, 12 Ch. D. at p. 586.

(*e*) *Nielsen v. Wait* (1885), 16 Q. B. D. 67. But evidence of such a custom may be inadmissible as being inconsistent with the terms of the charter, *Reynolds v. Tomlinson*, (1896) 1 Q. B. 586. In the latter case *Nielsen v. Wait* was distinguished, but it is difficult to reconcile it with *The Alhambra* (1881), 6 P. D. 68. See Note 3 to Article 37, *supra*.

(*f*) Whether the ship has become "an arrived ship" by reaching such a substituted point may involve a doubtful and difficult question of fact. Cf. *The Fox* (1914), 83 L. J. (P.) 89.

which the shipowner is entitled to go to such substituted point have been discussed in Articles 36 and 37, *supra*.

Where the charterer has the right to select, under the foregoing rules, the place to which the ship must proceed in order that she may be an "arrived" ship, he must exercise his right of selection reasonably. He need not select, in the interests of the shipowner, a place that is then free and accessible (*g*), so long as he selects one that is likely to be free in a reasonable time (*h*). In determining what is a reasonable selection of a place of loading by the charterer it is material to consider how far access to it is prevented or delayed "by obstacles caused by the charterer or in consequence of the engagements of the charterer." For if the ship is prevented by such causes "the lay-days commence to count as soon as the ship is ready to load, and would, but for such obstacles or engagements, begin to load at that place" (*i*).

If the charterer will not name any berth he will be liable for any damages occasioned by his refusal or delay (*k*).

When the ship has become an "arrived" ship, but the charterer has still the right to select the berth at which

(*g*) *Murphy v. Coffin* (1883), 12 Q. B. D. 87; *Tharsis Co. v. Morel* (1891) 2 Q. B. 647. See as to colliery guarantees *Dobell v. Green*, (1900) 1 Q. B. 526 (C. A.).

(*h*) *Per Bowen, L.J., Tharsis Co. v. Morel (ubi supra)*, at p. 652. In *Bulman v. Fenwick*, (1894) 1 Q. B. 179, the C. A. appears to hold that the only limitation to the charterer's power to select a berth is that he must not choose one that is so blocked that the obstacle cannot be removed in a time consistent with the commercial adventure. If the cause of delay is one which the parties must have contemplated, as neap tides, they must wait till the tides are suitable: *Carlton S.S. Co. v. Castle Mail Co.*, (1898) A. C. 486. If the owner, without waiting for the charterer to select a berth, proceeds to one of his own choice he must bear the expense of proceeding to the one selected, if selected reasonably, by the charterer: *The Felix* (1868), L. R. 2 A. & E. 273.

(*i*) *Per Kennedy, J., Aktieselskabet Inglewood v. Millar* (1903), 8 Com. Cas. 196, at p. 201. See also *Watson v. Borner* (1900), 5 Com. Cas. 377; *Ogmore v. Borner* (1901), 6 Com. Cas. 104. But see also and contrast *Harrowing v. Dupré* (1902), 7 Com. Cas. 157; *Quilpue v. Brown*, (1904) 2 K. B. 264 (C. A.). The unsatisfactory cases, *Ashcroft v. Crow Orchard Co.* (1874), L. R. 9 Q. B. 540; and *Wright v. New Zealand Co.* (1879), 4 Ex. D. 165, might conceivably be explained upon this principle, but probably they should be considered to have been wrongly decided. See *post*, note to Article 132—133.

(*k*) *Stewart v. Rogerson* (1871), L. R. 6 C. P. 424.

he will load her, it does not much matter how or when he exercises his selection of the berth for loading: any delay will be at his risk of paying demurrage or damages for detention.

Note.—There is probably no region of the English case law in which it is more difficult to reconcile all the decisions to be found in the books than that which is the subject of the foregoing article. The principles involved have been reviewed at intervals (notably in 1879 in *Nelson v. Dahl* (l), in 1891 in *Tharsis Co. v. Morel* (m), and in 1908 in *Leonis Co. v. Rank* (n)), and they appear to be now settled in the manner stated in the above article. That many cases can be found which at first sight, or even after exhaustive examination, seem inconsistent with these rules must be admitted. It seems unnecessary to follow the various heroic efforts made to explain or reconcile such cases at various times and by various judges. It will suffice to indicate a few of the more important ones.

1. *The Carisbrook* (o) was wrongly decided, and is overruled by *Tharsis Co. v. Morel* (m). The Scotch case of *Dall' Orso v. Mason* (p) seems to be erroneous for similar reasons (q).

2. *Davies v. McVeagh* (r) is to be explained in accordance with the view of Brett, L.J., in *Nelson v. Dahl* (s), as a decision in accordance with *Tapscott v. Balfour* (t), the charter being treated as one to load in the Wellington Dock, and not as one to load at the High Level in the W. Dock; and the *dicta* of Bramwell, L.J., which put the risk of delay in arriving at a berth under the latter form of charter on the shipowner and not on the charterer, are to be treated as overruled (u).

3. *Ashcroft v. Crow Colliery Co.* (v), which Bramwell, L.J., in *Davies v. McVeagh* (w), professed to follow, is wrong, if it holds that lay-days begin before arrival at the

(l) 12 Ch. D. 568.

(m) (1891) 2 Q. B. 647.

(n) (1908) 1 K. B. 499.

(o) (1890), 15 P. D. 98.

(p) (1876), 3 Sc. Sess. Cas., 4th Ser. 419.

(q) See *Tharsis Co. v. Morel*, (1891) 2 Q. B. at p. 653.

(r) (1879), 4 Ex. D. 265.

(s) 12 Ch. D. 539.

(t) (1872), L. R. 8 C. P. 46.

(u) See *Tharsis v. Morel*, (1891) 2 Q. B. at pp. 650, 651.

(v) (1874), L. R. 9 Q. B. 540.

(w) (1879), 4 Ex. D. 265.

place named for loading. It may possibly but very unsatisfactorily be explained, as by Lord Blackburn (x) and Brett, L.J. (y), as a decision on the extent of the charterer's liabilities and not as to the time when they began; but it is submitted that the most satisfactory way of dealing with it is to treat it as a decision that, where the only obstacle to the ship's reaching her berth is the previous liabilities of the charterer or his agents which would require unreasonable waiting, the lay-days begin when the ship is ready to proceed there (z).

4. The Scotch case of *Stephens v. Macleod* (a), would not, it is submitted, be followed in England. There a ship was chartered to load at P. or any usual one loading-place in the river as ordered on arrival, and load a cargo after being *berthed in turn*. The vessel was ordered to a particular loading-place, and was loaded in turn of the vessels ordered to that place, but vessels ordered to other places were loaded before her, at their berths, though they had arrived after her, this being according to the custom of the river. The Court of Session held (*semble* wrongly and *diss.* Lord Young), that the lay-days should have begun when the first turn of the ship at any loading-place would have arrived. It is submitted this entirely overlooks the right of the shipper to select his loading-berth, and the principle of *Tapscott v. Balfour* (b).

5. *Parker v. Winlow* (c) is wrong, unless it is to be explained as suggested in *Leonis v. Rank* (d).

6. *Sanders v. Jenkins* (e) is wrong, unless there was some proof of custom which is not apparent in the report. It was decided upon an admission of counsel, rightly made in view of *The Felix* (f), the effect of which admission seems to have been misapprehended by the Court (g).

* (x) In *Postlethwaite v. Freeland* (1880), 5 App. Cas. at p. 622. It has been otherwise explained by Barnes, J., in *Ogmore v. Borner* (1901), 6 Com. Cases, 104, as a case depending solely on its particular facts in which the Court "construed the particular contract as imposing an absolute obligation to load the vessel with the usual dispatch of the port, and that it was immaterial to consider whether the delay occurred inside or outside the dock." See also *per* Bigham, J., in *Harrowing v. Dupré* (1902), 7 Com. Cases, 157. This view, it is submitted, is inconsistent with the cases cited above.

(y) 12 Ch. D. 589.

(z) See footnote (i), p. 137, *supra*.

(a) (1891), 19 Sc. Sess. C. 38.

(b) (1872), L. R. 8 C. P. 46.

(c) (1857), 7 E. & B. 942.

(d) (1908), 1 K. B. at p. 514.

(e) (1897) 1 Q. B. 93.

(f) (1868), L. R. 2 A. & E. 273.

(g) See *Leonis v. Rank*, (1908) 1 K. B. at pp. 515-516.

7. *Milverton v. Cape Town Gas Co.* (h) seems doubtful, unless (i.) it was a case of a charter to proceed to a dock, or (ii.) it was a charter to a port, but there was some custom of the port making arrival in dock necessary. The facts are not very clear.

8. Generally it seems that the principle of construing a clause to load either in a fixed time or in a reasonable or customary time, as applicable to the whole stay in the port of loading, and not as only commencing on the ship's arrival at the particular place of loading specified in or named under the charter, is discountenanced by the decision in *Tharsis Co. v. Morel* (i), on the clause "with all dispatch as customary," approving *Tapscott v. Balfour* (j), a case of fixed lay-days, and approved in *Good v. Isaacs* (k), on the clause "as fast as steamer can deliver as customary."

Case 1 (l).—A ship was chartered to take coals to London, the vessel to be delivered in five working days: she entered the port of L. at Gravesend on March 9, but was not allowed to proceed to the Pool, the usual place for the discharge of colliers, till March 20. *Held*, that the lay-days were to be reckoned from the time of the ship's arrival at the ordinary place of discharge, according to the usage of the port of L. for such vessels (m).

Case 2.—A ship was chartered "to proceed to a port in the Bristol Channel, or so near thereto as she may safely get at all times of the tide and always afloat, eight running days, Sundays excepted, to be allowed the merchants for loading and discharging the cargo." The steamer was ordered to Gloucester and arrived at Sharpness, within the port of Gloucester, but seventeen miles from the usual basin for discharging grain cargoes; at S. she

(h) (1896), 2 Com. Cas. 281.

(i) (1891) 2 Q. B. at pp. 650, 651.

(j) (1872), L. R. 8 C. P. 46.

(k) (1892) 2 Q. B. 555.

(l) As the law as to loading and unloading on this point is identical, with the exception that no notice of readiness to unload is required, we have cited cases as to unloading in support of these propositions.

(m) *Kell v. Anderson* (1842), 10 M. & W. 498. The case of *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 544, is not inconsistent with this. There the charter was to proceed to Lima and deliver in the usual and customary manner. The ship proceeded to Callao, the usual port of discharge for L., but was prevented from discharging for seven days by acts of the Government; and it was held that if there had been a time fixed for the discharge it would have begun on arrival at the usual place of discharge, but that, as there was no fixed time, reasonable diligence only was required, and the delay from the time of arrival was not unreasonable under the circumstances. In *Thiss v. Byers* (1876), 1 Q. B. D. 244, where there was a fixed time named, the lay-days counted from the arrival at the usual place of discharge. See also *Brereton v. Chapman* (1831), 7 Bing. 559.

unloaded sufficient grain to enable her to proceed to the basin. The shipowner claimed to date his "running days" from commencing to discharge at S. A custom of the port of Gloucester was proved, that vessels too heavily laden to proceed beyond S. were lightened at S., and that the times of unloading at S. and G. counted in the lay-days, but not the time of proceeding from S. to G. *Held*, a reasonable custom, and not inconsistent with the charter, though, in its absence, the lay-days would have run consecutively, Sundays excepted, from commencing to discharge at S. (n).

Case 3.—A ship was chartered to proceed to any dock at Z., as ordered by charterers, and there load coal in the usual and customary manner. She was ordered to the W. docks. Coal is usually loaded in the W. docks from tips, sometimes from lighters. By the dock regulations of Z. no coal agent is allowed to have more than three vessels in the dock at the same time. The vessel was ready to go into the dock on July 3, but the charterers' agent having already three vessels in the dock, she was not admitted till July 11, and could not get under the tips till July 22. *Held*, that the lay-days commenced on July 11, and that the words "load in the usual and customary manner" referred to the manner and not the place of loading (o).

Case 4.—A ship was chartered to "proceed to the Mersey, and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston . . . , to be discharged when berthed with all dispatch as customary." On arrival at the dock a berth was ordered by the harbourmaster, as customary, but owing to the crowded state of the dock the vessel did not reach it for some time. *Held*, that the obligation of the charterers did not commence till the vessel was in berth (p).

Case 5.—A vessel was chartered to proceed to H., cargo to be discharged at usual fruit berth, as fast as steamer could deliver as customary and where ordered by charterers. On arrival the ship was ordered to a usual fruit berth, and moored there, but without permission of the officials controlling the quay, and was ordered away the next morning. *Held*, that the obligations of

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- (n) *Nielsen v. Wait* (1885), 16 Q. B. D. 67 (C. A.), where the decision proceeded on different grounds from that of Pollock, B., in the Court below, 14 Q. B. D. 516. But see *Reynolds v. Tomlinson*, (1896) 1 Q. B. 586, where a vessel chartered to a safe port and ordered to Gloucester, where she could not get without being lightened, refused to proceed beyond Sharpness, and the Divisional Court rejected evidence of the above custom, as contradicting the provision to proceed to a safe port. See also *M'Intosh v. Sinclair* (1877), 11 Ir. L. R. C. L. 460; *Caffarini v. Walker* (1876); 10 Ir. L. R. C. L. 250.

(o) *Tapscott v. Balfour* (1872), L. R. 8 C. P. 46. See also *Shadforth v. Cory* (1863), 32 L. J. Q. B. 379. In *S.S. Norden v. Dempsey* (1876), 1 C. P. D. 654, a custom for timber ships at Liverpool that the lay-days should begin on reaching a particular place in the dock, was proved and held binding.

(p) *Tharsis Co. v. Morel*, (1891), 2 Q. B. 647; *Modesto v. Dupré* (1902), 7 Com. Cases, 105.

the charterers to unload did not commence till the ship was in a usual fruit berth as ordered by charterers, and with the assent of the harbour authorities (y).

Case 6.—A ship was chartered to discharge cargo at a (named) quay at Z. The ship arrived and found the only quay berth occupied by another ship. The shipowner offered to discharge across the other ship, if the charterer would pay the additional expense. The charterer refused. *Held*, that the lay-days did not begin till the ship was alongside the quay, the place named where the voyage was to end (r).

Case 7.—A ship was chartered to load coals and proceed to Z., and deliver the same at one of four named places, "as ordered by charterer . . . forty-eight running hours for loading and discharge." She was ordered to discharge at W. Wharf, and entered the dock for that purpose; the discharging berths at the W. wharf being full, she did not begin to unload until twenty-four hours after entering the dock. *Held*, that the lay-days did not begin till the ship reached the W. wharf (s).

Case 8.—A ship was chartered to proceed to a customary loading-place in the R. dock, Grimsby, and there receive a cargo of coal, "to be loaded as customary at Grimsby as per colliery guarantee." The guarantee provided that the ship should be loaded in fifteen colliery working days after she was "ready in dock at Grimsby." The ship was ready in dock on September 3, but did not get under the spout at a customary loading-place till October 10. *Held*, that the lay-days began on September 3. *Seem*, that but for the colliery guarantee they would have begun when the ship could first get into a customary loading-berth selected by charterers (t).

Case 9.—Charter to proceed to a safe port as ordered, and there load. Ship ordered to Bahia Blanca. She arrived at B. B. and anchored off the pier, and gave notice of readiness. Charterers desired her to load alongside the pier, to which, after considerable delay, she proceeded. *Held*, that lay-days began when the ship was ready off the pier, and not merely when she got alongside (u).

Case 10.—A ship was chartered to load a cargo including machinery and explosives and to proceed to B. and there deliver her cargo at customary discharging places named by charterers' agents, according to the custom of the port; charterers authorised to sign bills of lading for cargo, and owners to abide by all the conditions thereof; cargo to be brought to and taken from alongside at charterers' expense. By the bill of lading, cargo was to be discharged at consignees' wharf at B., provided same was available, otherwise lighters to be provided by the consignees. At B.

(y) *Good v. Isaacs*, (1892) 2 Q. B. 557.

(r) *Strahan v. Gabriel* (1879), per Brett, L.J., 12 Ch. D. 590.

(s) *Murphy v. Coffin* (1883), 12 Q. B. D. 87.

(t) *Monsen v. Macfarlane*, (1895) 2 Q. B. 562; cf. *Thorman v. Downgate S.S. Co.*, (1910) 1 K. B. 410.

(u) *Leonis Co. v. Rank*, (1908) 1 K. B. 499.

the consignees' wharf was available, but a ship with explosives on board was only allowed to discharge at the X. Wharf, and the consignees' cargo had therefore to be lightered from the X. wharf to their own wharf. *Held*, that the shipowners were entitled to recover from the charterers the expense of this lightering which the shipowners had paid (*w*).

Article 40.—Readiness to Load.

A ship to be ready to load must be completely ready in all her holds, so as to afford the charterer complete control of every portion of the ship available for cargo (*x*). She must also in the absence of special stipulation have obtained all papers and permits necessary for loading (*y*).

But the degree of necessary readiness of the ship for her part is relative to that of the charterer or the consignees for theirs. Therefore the ship need not be absolutely ready (*e.g.* by having all her gear fixed up for the work) at a time when the charterer or consignees are not in a position to do any of their part of the work, so long as the ship can be absolutely ready as soon as they are (*z*).

(*w*) *Hull S.S. Co. v. Lamport* (1907), 23 T. L. R. 445.

(*x*) *Groves, MacLean & Co. v. Volkart* (1884), 1 C. & E. 309; *Oliver v. Fielden* (1849), 4 Ex. 135; *Balley v. De Arroyave* (1837), 7 A. & E. 919. But "the full reach and burden" of the ship refers only to her structural capacity at the date of the charterparty: *Japy Frères v. Sutherland*, (1921) 26 Com. Cas. 227. A ship may be "ready to load" cargo (maize) though part of her previous cargo (coals) is on deck intended for use as bunkers: *London Traders' Co. v. General Mercantile Co.* (1914), 30 T. L. R. 493. In practice the ship is considered "ready to load" though stiffening ballast, or cargo used for stiffening the ship, has yet to be put on board her. But to be "ready for stiffening" is not to be "ready to load." *Sailing Ship Lyderhorn v. Duncan*, (1909) 2 K. B. 929. A steamer may take her bunkers before proceeding to her loading port, and is not necessarily restricted to bunkers for the chartered voyage. *Carlton S.S. Co. v. Castle Mail Co.* (1897), 2 Com. Cases, 173 (the decision on this point not affected by the decisions on appeal). But usually she must not have more bunkers than are required by the chartered voyage: *Darling v. Raeburn*, (1907) 1 K. B. 846. In *Hick v. Tweedy* (1890), 63 L. T. 765, under a clause "Charterers have option of cancelling if ship is not ready to receive cargo by December 12," it was held sufficient that the ship herself should be ready to receive cargo though she was not in a loading-berth.

(*y*) *The Austin Friars* (1894), 10 T. L. R. 633.

(*z*) *Armement Deppe v. Robinson*, (1917) 2 K. B. 204. *Query* if the doctrine of *Budgett v. Binnington*, (1891) 1 Q. B. 35, applies before the ship is ready, *ibid*.

Case 1.—A ship was chartered with a power to the charterers to cancel the charter if the ship were not ready to load on or before May 31. On that day she had only discharged two of her holds, and was not completely discharged till the middle of the next day. *Held*, the charterers were entitled to cancel (a).

Case 2.—A ship under charter "to be ready to load on or before midnight on October 10," was on that day in port ready to load in all respects except that the doctor had not visited her and declared her free from infection. Without this formality no one could leave the ship nor come on board her. *Held*, she was not ready to load (b).

Case 3.—A ship was under charter to load nitrate after discharging an outward cargo of coal. She was to have stiffening supplied by charterers on receipt of forty-eight hours' notice of readiness to receive it. Charterers to have the right to cancel if ship not ready to load cargo on or before noon of 31st January. On 27th January the ship had discharged enough coal to need stiffening, and the captain gave notice to the charterers, requiring 700 tons of stiffening. The balance of the coal cargo could not have been discharged by noon of 31st January. *Held*, that the charterers were entitled to cancel (c).

Article 41.—Notice to Charterer of Readiness to Load.

The shipowner must give notice to the charterer of the ship's readiness to load her cargo at the place agreed on in the charter (d).

Case 1.—A ship was chartered to proceed direct to the S. dock, and there load in the usual and customary manner. In an action by shipowner against charterers for not loading, the latter pleaded that, by reason of want of notice of the ship's arrival at the S. dock and her readiness to load, the charterers were unable to load her. *Held*, a good defence, if proved (e).

Case 2.—A ship was chartered to proceed to A., and there load; she arrived at A. with a cargo on owner's account. Her arrival was entered at the Custom House, but no notice was given

(a) *Groves, Maclean & Co. v. Volkart* (1884), 1 C. & E. 309.

(b) *The Austin Friars* (1894), 10 T. L. R. 633.

(c) *Sailing Ship Lyderhorn v. Duncan*, (1909) 2 K. B. 929.

(d) *Stanton v. Austin* (1872), L. R. 7 C. P. 651; *Fairbridge v. Pace* (1844), 1 C. & K. 317. In *Gordon v. Powis* (1892), 8 T. L. R. 397, under the clause, "Captains or owners to telegraph advising probable arrival, and at least eight clear days' notice shall be given previous to requiring cargo," it was held that a telegram advising ship's departure from last port did not satisfy notice of readiness for cargo required.

(e) *Stanton v. Austin*, *vide supra*.

to the charterer of her readiness to load homeward cargo. *Held*, the charterer was not liable for failing to provide a cargo (*f*).

Article 42.—Duty of Charterer to furnish Cargo.

In the absence of express stipulations qualifying it, the duty of the charterer if he can legally do so (*g*) to furnish a cargo according to the charter is absolute (*h*). The charterer therefore will not be relieved from his express contract to load in a fixed time, or from his implied contract to load in a reasonable time, by anything preventing him from bringing a full and complete cargo to the place of loading (*i*).

“The usual dispatch in loading” means the usual dispatch of a person who has at the place of loading a cargo ready for loading (*j*). The exceptions in a charter do not

(*f*) *Fairbridge v. Pace* (1844), 1 C. & K. 317. What amount of notice will suffice is doubtful. If the charterers are proved to be otherwise aware of the readiness to load, *quære* whether express notice would be required. No notice is required of readiness to discharge. [*Vide post*, Art. 124.]

(*g*) *Ralli v. Compania Naviera*, (1920) 2 K. B. 287.

(*h*) He need only have his cargo ready at the ordinary time when the ship may be expected to be ready, and is not bound to provide for unexpected contingencies: *Little v. Stevenson* (1896), 74 L. T. 529 (H. L. Sc.); *Jones v. Green*, (1904) 2 K. B. 275, on which see *Ardan S.S. Co. v. Weir*, (1905) A. C. 501. See also *Wilson v. Thoresen*, (1910) 2 K. B. 405.

(*i*) Lord Selborne in *Coverdale v. Grant* (1884), 9 App. C. at pp. 475-6; Lord Blackburn in *Postlethwaite v. Freeland* (1880), 5 App. C. at p. 619; *Ardan S.S. Co. v. Weir*, (1905) App. Cas. 501. It is very difficult to reconcile the decision of the House of Lords in this last case with that of the Court of Appeal in *Jones v. Green* (*ubi supra*). As the duty to provide a cargo devolves on the charterer alone, he does not come within the principle of *Ford v. Cotesworth*, L. R. 4 Q. B. at pp. 133, 134; 5 Q. B. 544 (1870). Thus, in *Kirk v. Gibbs* (1857), 1 H. & N. 810, where a charterer had contracted to load a full cargo, and to procure the necessary Government pass for loading: *Held*, no defence that the Government would only grant a pass on condition a full cargo was not loaded. So if the duty is on the shipowner alone, as in *Hills v. Sughrue* (1846), 15 M. & W. 253. For a similar rule with regard to discharging, see *Kruuse v. Drynan* (1891), 18 Sc. Sess. C. 1110; *Granite S.S. Co. v. Ireland* (1891), 19 Sc. Sess. C. 124.

(*j*) *Kearon v. Pearson* (1861), 7 H. & N. 386. So “loading in customary turn by the G. W. R. Co.,” means the customary manner of loading cargo ready at the port, and where the charterer had not enough cargo at the port by reason of the customary method of the G. W. R. in bringing cargo to the port he was not protected against a claim for demurrage: *The Sheila*, (1909) P. 31, note.

usually apply to protect the charterer who has failed to load, till the joint operation of loading is ready to begin, ship and cargo being ready at the place of loading (*k*). Thus, in the absence of express exceptions, the charterer will not be excused from loading by:—(I.) causes preventing a cargo being obtained, as strikes (*l*), bankruptcy of merchants supplying the cargo (*l*), or non-existence of such cargo (*m*), or:—(II.) causes preventing a cargo, when obtained, from being transmitted to the port of loading, as ice (*n*), bad weather (*o*), railway delays (*p*), or Government orders (*q*).

The charterer may be released from such a contract by :

I. Express exceptions, the perils excepted being proved not merely to exist, but also directly to prevent the loading of the ship (*r*).

II. Evidence that the parties, when they contracted, were aware of a particular state of things, which might

(*k*) *Coverdale v. Grant* (1884), 9 App. C. 470; *Kay v. Field* (1883), 10 Q. B. D. 241.

(*l*) *Per Lord Selborne*, 9 App. C. 476; *Stephens v. Harris*, *vide infra*, note (*t*). Even with an exception of "strikes," and a strike causing delay, the charterer is not absolved if he has not made a proper contract for purchase of the cargo, under which contract the delay might have been avoided: *Dampskibsselskabet Danmark v. Poulsen* (1913), Sess. Cas. 1043.

(*m*) *Hills v. Sughrue* (1846), 15 M. & W. 253; *cf. Ashmore v. Cox*, (1899), 1 Q. B. 436.

(*n*) *Coverdale v. Grant*, *vide supra*; *Kay v. Field*, *vide supra*; *Kearon v. Pearson* (1861), 7 H. & N. 386.

(*o*) *Fenwick v. Schmalz* (1868) L. R. 3 C. P. 313.

(*p*) *Adams v. Royal Mail Steam Co.* (1858) 5 C. B. N. S. 492; *Elliott v. Lord* (1883), 52 L. J. P. C. 23.

(*q*) *Semble from Ford v. Cotesworth* (1869), L. R. 4 Q. B. 127; and see Case 6, *post*. As to illegality, see *Ralli v. Compania Naviera*, (1920) 2 K. B. 287.

(*r*) *Per Lord Blackburn* (1880), *Postlethwaite v. Freeland*, 5 App. C. at p. 619; *The Village Belle* (1874), 30 L. T. 232. Thus the perils must prevent the loading of cargo by any ship: e.g., the order of an invading army that no grain shall be exported: *Bruce v. Nicolopoulou* (1855), 11 Ex. 129. Where a snow-storm prevented transit of cargo to the loading port it was held not to be "an accident beyond the control of the charterer, preventing or delaying the loading," it being an ordinary operation of nature: *Fenwick v. Schmalz*, *vide supra*, note (*o*). But see *The Torbryan*, (1903) P. 194. Generally, a cause which prevents or delays the provision of a cargo is not a cause "preventing or delaying loading." *Cf. Arden S.S. Co. v. Mathwin* (1912), Sess. Cas. 211.

cause delay, provided that the actual delay is not unreasonable (*s*).

III. Evidence that there was only one method of loading ever used at the port, which involved in all cases the transit of cargo from a particular place in a particular way, in which case accidents preventing such transit may come within exceptions "preventing loading" (*t*).

When once the loading is completed, the charterer's obligation is fulfilled (*u*), and subsequent delays (*v*), as by ice (*x*), or failure to procure clearances (*y*), must fall on the shipowner.

The cargo tendered must be one reasonably complying with the terms of the charter (*z*).

If the charter is for a specified description of cargo, and the charterer ships goods of a different description, the shipowner can claim the market rate of freight for that other cargo in excess of the chartered freight (*a*).

Case 1.—A ship was chartered to "proceed to Cardiff East Bute Dock and there load iron in the customary manner . . . cargo

(*s*) *Harris v. Dreesman* (1854), 23 L. J. Ex. 210; *cf. Carlton S.S. Co. v. Castle Mail Co.*, (1898) A. C. 486; and see *Case 7, infra. Jones v. Green*, (1904) 2 K. B. 275, if not overruled by *Ardan Co. v. Weir*, (1905) App. Cas. 501, appears to fall under this principle.

(*t*) *Hudson v. Ede* (1868), L. R. 3 Q. B. 412, as explained by Lord Selborne in *Coverdale v. Grant* (1884), 9 App. C. 477, and by the C. A. in *Stephens v. Harris* (1887), 57 L. J. Q. B. 203. This case was followed by Charles, J., in *S.S. Allerton Co. v. Falk* (1888), 6 Asp. M. C. 287, on facts applicable to the salt trade in the Mersey. In *The Alne Holme*, (1893) P. 173, the same principle was applied to the port of discharge. See also *Furness v. Forwood Bros.* (1897), 2 Com. Cases, 223 (ore coming by rail to Poti); *Richardson v. Samuels*, (1898) 1 Q. B. 261 (oil coming by rail to Batoum); *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174 (C. A.) (nitrate coming down to Iquique).

(*u*) *Smith v. Wilson* (1817), 6 M. & S. 78.

(*v*) Other than those caused by the charterer, *e.g.*, by his not presenting bills of lading for signature. *Cf. Nolisement Co. v. Bunge*, (1917) 1 K. B. 160.

(*x*) *Pringle v. Mollett* (1840), 6 M. & W. 80.

(*y*) *Barret v. Dutton* (1815), 4 Camp. 333. Otherwise if the charterer fails to provide necessary documents or information.

(*z*) *Holman v. Dasnieres* (1886), 2 Times L. R. 480, 607. Thus a charter to load a cargo of pitch in bulk will not be satisfied by a cargo which has melted and has to be dug out of the trucks; a "cargo of machinery" without any particular description of it, by a single piece of machinery, to ship which the master must cut open his decks. *Cf. Isis Co. v. Bahr Behrend*, (1900) A. C. 340.

(*a*) *Steven v. Bromley*, (1919) 2 K. B. 722.

to be supplied as fast as steamer can receive . . . time to commence from the vessel's being ready to load, excepting in case of hands striking work, or frosts, or floods, or any other unavoidable accidents preventing the loading."

The charterer's agent had his own iron at a wharf in a canal outside the dock; but there were other agents with wharves in the dock, and it was possible, though expensive, to bring the iron from the wharf to the dock by land. Frost stopped the transit of the iron by the canal, though it would not have stopped the loading if the cargo had been in the dock. *Held*, that the charterers were liable for the delay, as the frost did not prevent the loading, but only the transit of the cargo to the place of loading by one of the ways usual at the port (b).

Case 2.—A ship was chartered to load coal "in regular and customary turn, except in case of riots, strikes, or other accidents beyond charterers' control delaying or preventing loading." A snow-storm delayed the transit of the cargo to a place of loading. *Held*, the charterers were liable for the delay (c).

Case 3.—A shipowner agreed to send his ship to X., and there find and take on board a full cargo of guano. There was no guano at X. within a reasonable time of the ship's arriving. *Held*, the shipowner was absolutely bound to find and load a full cargo (d).

Case 4.—A ship was chartered to load at X. a full cargo of coals taking her turn with other steamers, and receive prompt dispatch in loading and discharging. The ship was loaded in her turn, but was delayed owing to a short supply of coals from the mines. *Held*, the charterer was liable for the delay (e).

Case 5.—A ship was chartered to proceed to X., and there load coals in the customary manner. The loading was delayed by a dispute between the railway and the collieries as to rates of carriage, and by a strike of colliers. *Held*, that the charterers were liable for the delay (f).

Case 6.—A ship is chartered to load cattle at an English port; though the loading of cattle already at that port would not be prohibited, their transfer to that port is forbidden by Order in

(b) *Coverdale v. Grant* (1884), 9 App. C. 470. See also *Kay v. Field* (1883), 10 Q. B. D. 241, and *The Rockwood* (1894), 10 T. L. R. 314 (C. A.). In *Kearon v. Pearson* (1861), 7 H. & N. 386, it was said "the time for loading has no reference to the place whence the cargo is to come," i.e., "usual dispatch" could not be construed "usual dispatch of cargo coming from a particular colliery," but "usual dispatch of persons having a cargo ready for loading." Cf. *The Sheila*, (1909) P. 31, note.

(c) *Fenwick v. Schmalz* (1868), L. R. 3 C. P. 313; see note (r), p. 146.

(d) *Hills v. Sughrue* (1846), 15 M. & W. 253. This case is quite inconsistent with *Clifford v. Watts* (1870), L. R. 5 C. P. 577. Brett and Willes, JJ., in that case treat it as a contract by the charterer to find a full cargo, which it certainly was not.

(e) *Elliott v. Lord* (1883), 52 L. J. P. C. 23.

(f) *Adams v. Royal Mail Steam Co.* (1858), 5 C. B. N. S. 492.

Council. *Submitted*, the charterer would be liable for delay arising from such order (g).

Case 7.—A ship was chartered to load at S. colliery. Before signing the charter both parties knew that the colliery engine had broken down and was being repaired. *Held*, that if the engine was repaired, and the ship loaded, in a reasonable time, the charterer was not liable, as the owners signed the charter, knowing of the breakdown of the engine (h).

Case 8.—A ship was chartered to proceed to X. "and there load grain; the cargo to be brought to and taken from alongside the ship at the ports of loading and discharge at the charterer's expense and risk . . . thirty running days for loading . . . detention by ice not to be reckoned as lay-days." All grain loaded at X. was brought by river from U., ninety miles off. Owing to ice between U. and X. the cargo was detained in transit to X. *Held*, that the conveyance from U. by water, being the only method used, must be considered as part of the act of loading, and that the exception as to ice relieved the charterer from liability (i).

Case 9.—A ship was chartered for an outward and homeward voyage; she was loaded and dispatched on her outward voyage; but captured and brought back for adjudication; her cargo was taken out and sold. The owner on receiving her back offered her again to the charterers to carry the outward cargo. *Held*, that he was not entitled to do so (j).

Case 10.—A ship chartered with thirty running days for loading finished her loading on February 25, but owing to a fire at the custom-house her clearances could not be obtained till March 9, when she sailed. *Held*, that, as it was the duty of the owner to obtain clearances, the charterer was not liable for the delay (k).

(g) On authority of *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 544: if export from the English or foreign port were actually forbidden, the charterer would be excused. *Vide supra*, note (g) on p. 146, and *Ralli v. Compania Naviera*, (1920) 2 K. B. 287.

(h) *Harris v. Dreesman* (1854), 23 L. J. Ex. 210.

(i) *Hudson v. Ede* (1868), L. R. 3 Q. B. 412, as explained by Lord Selborne in *Coverdale v. Grant* (1884), 9 App. C. 477. The dictum of Willes, J., approved by the Court in *Hudson v. Ede*, that "whenever there was no access to the ship by reason of excepted perils from any one of the storing places from which goods were conveyed direct to the ship, the exception in the charter would apply," must be taken as overruled by *Coverdale v. Grant*, unless "any one" means "all." See also *Stephens v. Harris* (1887), 57 L. J. Q. B. 203. *Cf. Allerton S.S. Co. v. Falk* (1888), 6 Asp. M. C. 288, and the cases cited in note (t) on p. 147.

(j) *Smith v. Wilson* (1817), 6 M. & S. 78.

(k) *Barret v. Dutton* (1816), 4 Camp. 333. On a charter that the ship "should be consigned to charterers' agent free of commission," and cargo to be taken from vessel free of any expense to the ship; *Held*, that the charterers must clear ship and cargo free of expense to the owner: *Russell v. Griffith* (1860), 2 F. & F. 118. When a ship was chartered to proceed with cargo to F., "where the ship shall be consigned to charterer's agents inwards and outwards, paying the usual commission;"

Case 11.—A ship was chartered to discharge in forty-eight hours, except in case of strike . . . detention by railway or cranes . . . or any other cause beyond the control of the charterers which might impede the ordinary lading and discharging of the vessel; owing to a railway strike, railway waggons to receive the coal were not forthcoming; the cargo could have been discharged on the quay. *Held*, that the charterers were not protected by the exceptions (l).

Case 12.—A ship was chartered to load at New York a cargo of steel billets at 23s. a ton. The charterer shipped 1208 tons of steel billets and 987 tons of general merchandise. At the time of shipment the market rate for general goods was higher than 23s. a ton. *Held*, that the shipowner could claim the higher market rate of freight on the 987 tons (m).

Article 43.—“Alongside.”

In ordinary circumstances goods to be brought to, or taken from, “alongside” must be delivered immediately alongside, *i.e.* to or from the ship’s tackle (n). Where there is evidence of custom to explain what is meant at the port by either “delivery,” or “alongside” (o), or where it is clear from the charter that it is contemplated that the ship should do something outside herself, as in

Held, not to bind the shipowner to take a homeward cargo from F., from charterer’s agents, but only, if he took any cargo at F., to employ charterer’s agents for the ship-broking work: *Cross v. Pagliano* (1870), L. R. 6 Ex. 9. The broker’s work and the Customs work are usually provided for by separate clauses in the charter: “The ship to be consigned to . . .” for the broker’s work, and “the ship to be reported by . . .” for the Customs work.

(l) *Granite S.S. Co. v. Ireland* (1891), 19 Sc. Sess. C. 124. *Cf. Kruuse v. Drynan* (1891), 18 Sc. Sess. C. 1110.

(m) *Steven v. Bromley*, (1919) 2 K. B. 722.

(n) *Petersen v. Freebody*, (1895) 2 Q. B. 294, where no custom was alleged.

(o) *Aktieselskab Helios v. Ekman*, (1897) 2 Q. B. 83 (C. A.), in which the shipowner was required by the custom in London to put timber into barges. This custom has been excluded by the words, “any custom of the port to the contrary notwithstanding:” *Brenda v. Green*, (1900) 1 Q. B. 518. See also *Glasgow Navigation Co. v. Howard* (1910), 15 Com. Cas. 88, as to lumber cargoes in London, and *Northmoor S.S. Co. v. Harland and Wolff* (1903), 2 Ir. Rep. 657, as to timber at Belfast. But where the custom requires the shipowner to do something which is inconsistent with delivery “alongside,” evidence of it will be inadmissible. See Article 8, *supra*, and *Palgrave v. Turid* (1922), 1 A. C. 397, overruling *Stephens v. Wintringham* (1898), 3 Com. Cas. 169; *cf. also The Nifa* (1892), P. 411.

the clause "cargo to be brought alongside, whence it shall be put on board by the master," "alongside" may have a wider meaning (*p*).

The shipowner's duty does not begin till the goods are under his charge (*q*).

If the shipowner takes the goods for loading before they have been brought to the place to which it is the duty of the charterer under the charter to bring them, he cannot, without express agreement to that effect, claim from the charterer any extra expense incurred in so doing (*r*).

Article 44.—Charterer's Refusal to load.

If the charterer expressly refuses to load the vessel, the shipowner need not wait till the end of the days allowed for loading before he can sue for a breach of the contract to load, but may treat such a refusal as final (*s*). If he does not accept the refusal as final (*t*) the charterer may retract it, and may begin to load at any time before the lay-days have expired (*u*).

In such a case, if the contract becomes illegal before the lay-days have expired (*v*), such illegality will absolve the charterer from the performance of his contract, even though he has expressly refused to load before the con-

(*p*) *Holman v. Dasnieres* (1886), 2 Times L. R. 480, 607. As to the liability of the shipowner in such a case, see *Nottebohm v. Richter* (1886), 18 Q. B. D. 63; and contrast *Dampskibsselskabet S. v. Calder* (1911), 17 Com. Cas. 97. Where salt discharged in buckets was lost between ship and quay, it was held that the ship had not fulfilled her obligation to deliver the cargo "alongside;" *Avon SS. Co. v. Leask* (1890), 18 Sc. Sess. Cas. 280. On the words "ex car," see *Isis SS. Co. v. Bahr Behrend* (1898), 3 Com. Cases, 325.

(*q*) *Per Lord Selborne in Coverdale v. Grant* (1884), 9 App. Cas. at p. 475. See also *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499.

(*r*) *Holman v. Dasnieres* (1886), 2 Times L. R. 480, 607. In *Fletcher v. Gillespie* (1826), 3 Bing. 635, there was such an express agreement.

(*s*) *Danube Co. v. Xenos* (1863), 13 C. B. N. S. 825.

(*t*) As regards his duty, in that case, to mitigate the damages, see Note 2 to Article 159, *infra*.

(*u*) *Reid v. Hoskins* (1856), 6 E. & B. 953.

(*v*) As in *Esposito v. Bowden* (1857), 7 E. & B. 763; *Avery v. Bowden* (1856), 6 E. & B. 953, 962.

tract becomes illegal, provided that the owner has not previously accepted such a refusal as final (*x*).

Case 1.—A. by his agent agreed to carry C.'s goods in his ship, the shipment to commence on August 1. On July 21, A. wrote to C. saying that his agent had no authority to make the contract; on July 23, A. still repudiated it, but offered a substituted contract. C. gave A. notice that he would hold A. bound by the original contract, but that, if A. failed to perform it, C. would make other arrangements. On August 1, A. wrote that he was prepared to ship the goods, making no reference to the original contract. C. declined, having made other arrangements. *Held*, that C. had a right to treat A.'s repudiation as a final breach (*y*).

Case 2.—An English ship was chartered to proceed to X. and there load a cargo in forty-five running days. The vessel was ready to load on March 9; between March 1 and April 1 the charterer repeatedly refused to load, but the captain stayed on at X. ready to load. On April 1, and before the expiration of the running days, war broke out between England and Russia; the captain finally sailed on April 22. *Held*, that as the captain had never accepted the refusal to load as final, the charterer had the whole of the running days to perform his contract in, and, if before then the performance became illegal, he was discharged (*x*).

Demurrage: see Section IX., Articles 128—135, *post*.

Loading in fixed time: see Article 131, *post*.

Loading in reasonable time: see Article 132, *post*.

Loading with customary dispatch: see Article 133, *post*.

Article 45.—*Loading.*

Stipulations as to loading or unloading in a charter or bill of lading are to be construed with reference to the customs of the port of loading or discharge (*z*), unless

(*x*) *Reid v. Hoskins* (1856), 6 E. & B. 953.

(*y*) *Danube Co. v. Xenos* (1863), *vide supra*. This case follows the principle of *Hochster v. De la Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1872), L. R. 7 Ex. 111, discussed in *Johnstone v. Milling* (C. A.) (1886), 16 Q. B. D. 460.

(*z*) *Carali v. Xenos* (1862), 2 F. & F. 740, seems to shew that it may not be sufficient to follow the usual custom of the docks, if unusual damage can be prevented from occurring by special exertion.

such customs contradict or vary express stipulations in the charter or bill of lading (a).

The practice of one or some merchants at a port will not make a custom (b), but, where the practice is universally followed at the port, it will bind even persons ignorant of it (c) unless inconsistent with the written documents (d).

Note.—On a charter to discharge “according to the custom of the port,” the jury were directed by Lord Coleridge “that ‘custom’ in the charter did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port.” This direction was considered by Lord Blackburn “quite correct” (e).

Case 1.—A ship was chartered to load at X. “a full and complete cargo of sugar, molasses, and/or other lawful produce.” Evidence was tendered of a custom at X. that a full cargo of sugar and molasses meant a cargo composed of particular kinds of package, i.e. hogsheads of sugar, and puncheons of molasses. *Held*, admissible (f).

Case 2.—A ship was chartered to load at X. coal and coke “in regular turn.” The loading of coal at X. is regulated by statute. *Held*, that evidence as to the custom at X. of loading coke was admissible to explain “in regular turn” (g).

(a) *Per* Lord Blackburn in *Postlethwaite v. Freeland* (1880), 5 App. C. 599, at p. 613, who curiously enough omits the qualification that the custom must not contradict the writing: *Aktieselskab Helios v. Ekman*, (1897) 2 Q. B. 83 (C. A.); *Cuthbert v. Cumming* (1856), 11 Ex. 405; *Leidemann v. Schultz* (1853), 14 C. B. 38; *Pust v. Dowie* (1864), 5 B. & S. 20; *The Skandinav* (1882), 51 L. J. Ad. 93; *Brenda Co. v. Green*, (1900) 1 Q. B. 518. See also *Benson v. Schneider* (1817), 7 Taunt. 272; *Nielsen v. Neame* (1884), 1 C. & E. 288. See also Article 8, *supra*.

(b) *Lawson v. Burness* (1862), 1 H. & C. 396; *Newall v. Royal Exchange Co.* (1885), 33 W. R. 342, 868; *Royal Exchange Shipping Co. v. Dixon* (1886), 12 App. C., *per* Lord Watson at p. 18. The practice of the only shipper at the port for thirty years has been held not to constitute a custom of the port: *Glacovich v. Hutcheson* (1887), 15 Sc. Sess. Cas. 4th Ser. 11. But see *Temple v. Runnalls* (1902), 18 T. L. R. 822. And see *Cazalet v. Morris* (1916), Sess. Cas. 952.

(c) *King v. Hinde* (1883), 12 Ir. L. R. C. L. 113; *Robertson v. Jackson* (1845), 2 C. B. 412; *Hudson v. Ede* (1868), L. R. 3 Q. B. 412. See *Note* to Article 8, p. 30, *ante*.

(d) *Hudson v. Clementson* (1856), 18 C. B. 213; *Coverdale v. Grant* (1884), 9 App. C. 470, 478; *Hillstrom v. Gibson* (1879), 8 Sc. Sess. Cas. 3rd Ser. 463, where the words in the original printed charter, “deliver according to the custom of the port,” had been struck out of the charter.

(e) *Postlethwaite v. Freeland* (1880), 5 App. C. at p. 616.

(f) *Cuthbert v. Cumming* (1856), 11 Ex. 405.

(g) *Leidemann v. Schultz* (1853), 14 C. B. 38.

Case 3.—A charter was made “on condition of the ship’s taking a cargo of not less than 1000 tons of weight and measurement.” *Held*, that the relative proportions of “weight and measurement goods” were to be determined by the usage of the port of loading (*h*).

Case 4.—A ship was chartered to proceed to X. and there load in the customary manner a full and complete cargo of M. coke, “to be loaded in regular turn.” The vessels for M. coke were loaded by the M. Colliery in the order of their entry in a book, and not of their readiness to load, and this ship was so loaded. The jury found that the ship was loaded according to the practice of the M. Colliery, but that it was not an established or known custom, and that “regular turn” meant “order of readiness,” not “order of entry on the book.” *Held*, that the charterer was liable for demurrage (*i*).

Case 5.—A sailing vessel was chartered to proceed to X. for coals and load “in regular turn”; there is only one colliery at X., and the practice of that colliery is to supply steamers in their order of readiness, and sailing vessels in their order, but to postpone sailing vessels to steamers; and this applies to all coal vessels at X. The owner was ignorant of this usage. *Held*, that this usage was the custom of the port, and that “regular turn” was to be construed according to it, the owner’s ignorance being immaterial (*k*).

Case 6.—A ship was chartered to proceed to Algiers with coal, “the lay-days reckoning from the time of the vessel being ready to unload and in turn to deliver.” The coals were shipped for the French Government, though the shipowner did not know it, and by their regulations, such coals might only be discharged at a particular place, and in a particular order. *Held*, that evidence of usage was admissible to explain “in turn to deliver,” and that the Government regulation, being binding on all such vessels, must be taken as a usage of the port, the shipowner’s ignorance being immaterial (*l*).

Case 7.—A ship was chartered to proceed to X. and load grain; all grain is brought to X. from U., ninety miles up river, by water; this universal custom of the port was well known in the grain trade, but not to the shipowner. *Held*, that he was bound by it (*m*).

c

(*h*) *Pust v. Dowie* (1864), 5 B. & S. 20. See note to Article 25 as to “weight and measurement.” For a special case as to customary nature of cargo shipped, see *Potter v. N. Z. Shipping Co.* (1895), 1 Com. Cases, 114.

(*i*) *Lawson v. Burness* (1862), 1 H. & C. 396.

(*k*) *King v. Hinde*, 12 Ir. L. R. C. L. 113. The Scotch case of *Stephens v. Macleod* (1891), 19 Sc. Sess. Cas. 38, appears to contradict this, and is, it is submitted, erroneous. See *ante*, p. 139.

(*l*) *Robertson v. Jackson* (1845), 2 C. B. 412.

(*m*) *Hudson v. Ede* (1868), L. R. 3 Q. B. 412.

Article 46.—To load a full and complete Cargo.

“Full and complete cargo” means a full and complete cargo according to the custom of the port of loading (*n*).

Where a vessel is chartered as of a certain capacity, and the charterer undertakes to load a “full and complete cargo,” he cannot limit his liability by the capacity named in the charter, but must load as much cargo (*o*) as the ship will carry with safety (*p*).

But where a certain number of tons is stipulated for in the clause as to “cargo,” that number and not the actual capacity of the vessel will constitute the approximate measure of the charterer’s obligation (*q*). The charterer is bound to put on board goods equivalent to the cargo stipulated for, or to a full and complete cargo, though, owing to their destruction before the ship sails,

(*n*) *Cuthbert v. Cumming* (1856), 11 Ex. at p. 409; and see Article 45. See also *Colonial Ins. Co. v. Adelaide Ins. Co.* (1886), 12 App. C. at p. 134. In *Furness v. Tennant* (1892), 8 T. L. R. 336, the charter ran “to load a full and complete cargo of sugar in hogsheads and in bags.” The captain, without asking the nature of the cargo, so stowed the bags tendered to him, that certain hogsheads afterwards tendered could not be stowed, and the ship sailed with her alley ways, in which bags could have been stowed, empty. *Held*, that as the failure to carry a complete cargo was due to the shipowner’s stowage, the charterer was not liable. The clause does not in the absence of custom give the charterer any right to carry passengers (*Shaw Savill v. Aitken* (1883), 1 C. & E. 195), or goods (*Mitcheson v. Nicoll* (1852), 7 Ex. 929), in the cabins.

(*o*) “Cargo” usually means an entire shipload: *Kreuger v. Blanch* (1870), L. R. 5 Ex. 179; *Borrowman v. Drayton* (1877), 2 Ex. D. 15: but not necessarily a “full and complete cargo”; *Miller v. Bomer*, (1900) 1 Q. B. 691. See also *In re Harrison and Micks, Lambert & Co.*, (1917) 1 K. B. 755. But a contract to load a “cargo” stated to be less than the capacity of the vessel leaves the shipowner at liberty to load other cargo: *Caffin v. Aldridge*, (1895) 2 Q. B. 648 (C. A.). As to “dead weight capacity,” see Article 25.

(*p*) *Heathfield v. Rodenache*, (1896), 2 Com. Cases, 55 (C. A.); *Thomas v. Clarke* (1818), 2 Stark. 450; *Hunter v. Fry* (1819), 2 B. & Ald. 421. Where the cargo contracted for varies in size or weight or condition according to the time of year, the charterer will fulfil his obligation by supplying a full and complete cargo of the goods in their normal condition at the time of shipment; *e.g.*, by supplying wood-pulp in the winter frozen hard, under a contract to ship “wet wood-pulp”: *Isis Co. v. Bahr Behrend*, (1900) A. C. 340.

(*q*) *Morris v. Levison* (1876), 1 C. P. D. 155; *Alcock v. Leeuw* (1884), 1 C. & E. 98; *Miller v. Bomer*, (1900) 1 Q. B. 691. See, however, *Jardine Matheson & Co. v. Clyde S.S. Co.*, (1910) 1 K. B. 627, where the charter was to load “a cargo of beans not less than 6500 tons, but not

they may not all be carried in the ship (*r*). But when the charterer has loaded goods which have been destroyed by an excepted peril, he is not bound, nor is he entitled, to load other goods in the same space, and the shipowner has the right to fill that space with goods and take the freight thereon (*s*).

Where the ship is stowed in a manner that does not make full use of her hold, but the charterer or his agents saw the stowage and made no objection, the shipowner will not be liable for not loading a full and complete cargo (*t*).

The charterer is entitled to the full benefit of the use of the ship, and the shipowner is not entitled to impair that full benefit by loading more bunker coals than are reasonably necessary for the chartered voyage (*u*).

Lawful merchandise: = goods ordinarily shipped from the port of shipment (*x*).

exceeding 7000 tons . . . which the charterers bind themselves to ship not exceeding what she can reasonably stow and carry." The charterers loaded 6590 tons, which was not a full cargo, and it was held that they would be liable to load a full cargo of 6950 tons. The charterers, however, succeeded on the point that where the charterer is given the use of the ship, except the bunkers, he is not required to load cargo in the cross-bunker forward of the engine-room, which can usually be used either for cargo or for coal. See 15 Com. Cas. 193.

(*r*) Thus in *Jones v. Holm* (1867), L. R. 2 Ex. 335, where when a ship had loaded part of her cargo she caught fire, and the cargo on board being damaged had to be sold: *Held*, that the charterer was not bound to replace the damaged cargo, but was bound to supply so much as would with the damaged cargo make a "full and complete cargo." But see *Strugnell v. Friedrichsen* (1862), 12 C. B. N. S. 452, where the discharge of three-quarters of the cargo under similar circumstances by the master's request, and at the charterer's expense, was held to free the charterer from any further liability.

(*s*) *Aitken v. Ernsthausen*, (1894) 1 Q. B. 773. This seems to be so whether the rate of freight is a rate per ton or a lump sum. Cf. *Weir v. Girvin Roper*, (1900) 1 Q. B. 45.

(*t*) *Hovill v. Stephenson* (1830), 4 C. & P. 469.

(*u*) *Darling v. Raeburn*, (1907) 1 K. B. 846. In *Carlton S.S. Co. v. Castle Mail Co.* (1897), 2 Com. Cas. 173 (not reversed on this point on appeal), the shipowner was held entitled to ship more bunkers than were necessary for the chartered voyage, but this was on proof that such a course was customary.

(*x*) *Vanderspar v. Duncan* (1891), 8 T. L. R. 30, where Government guns were held not lawful merchandise from Ceylon. Cf. *Potter v. New Zealand S. Co.* (1895), 1 Com. Cases, 114.

Case 1.—A vessel was chartered “to load a full and complete cargo of iron, say about 1100 tons.” The actual tonnage of the ship was 1210 tons. The charterer furnished 1080 tons. *Held*, that the charterer was only bound to “load about 1100 tons,” that 3 per cent. was a fair margin; hence that he should have loaded 1133 tons (*y*).

Case 2.—A ship was guaranteed to carry 2600 tons deadweight, and charterers undertook to load a full and complete cargo at a named freight, “all per ton dead weight capacity as above.” A full and complete cargo would be 2950 tons. *Held*, (1) charterers should load 2950 tons; (2) freight was payable on that quantity at the named rate (*z*).

Article 47.—Broken Stowage.

Where there is a charter “to load a full and complete cargo,” if the cargo loaded leaves room that may be filled with “broken stowage,” such broken stowage must be provided unless the custom of the port of loading does not require it (*a*).

Case.—A ship was chartered “to load at X. a full and complete cargo of sugar, molasses, and/or other produce.” The charterer filled the ship with sugar in hogsheads and molasses in puncheons, but did not fill up with broken stowage. Evidence of a custom at X. that “full and complete cargo of sugar and molasses”

(*y*) *Morris v. Levison* (1876), 1 C. P. D. 155. But see *Miller v. Borner*, (1900) 1 Q. B. 691, on the words “a cargo of about 2800 tons,” and *Jardine Matheson & Co. v. Clyde S.S. Co.*, (1910) 1 K. B. 627, on the words “a cargo of beans not less than 6500 but not exceeding 7000 tons.” A cargo of so many tons, “or thereabouts,” is frequently taken to allow a margin of 5 per cent. either way. This sort of usage is old: “If the ship be freighted for 200 Tuns or thereabouts, this addition (or thereabouts) is within five Tuns commonly taken and understood.” (Malynes, *Lex Mercatoria*, 1686, p. 100.) In *Alcock v. Leeuw* (1884), 1 C. & E. 98, a charter to ship “empty petroleum barrels as required by the master, say about 5000,” was held to allow the master 10 per cent. margin on either side of 5000. In *Société Anonyme v. Scholefield* (1902), 7 Com. Cases, 114, a custom of the Newcastle coal-trade that the word “about” gave the vendor an option of 5 per cent. either way was proved and upheld by the C. A. Where the word “about” is not used, see *Harland v. Burstall* (1901), 6 Com. Cases, 113. See also *Thornett v. Yuills* (1921), 1 K. B. 219. The margin expressly permitted by “about” will still be subject to the rule “*De minimis non curat lex*”; *Shipton v. Weil* (1912), 17 Com. Cas. 153.

(*z*) *Heathfield S.S. Co. v. Rodenacher* (1896), 2 Com. Cases, 55 (C. A.).

(*a*) *Cole v. Meek* (1864), 15 C. B. N. S. 795; see also *Duckett v. Satterfield* (1868), L. R. 3 C. P. 227.

meant cargo so stowed without broken stowage, *held* admissible, and the custom reasonable. *Held*, therefore, that the charterer had fulfilled his obligation (b).

Article 48.—Deck Cargo.

Goods are to be loaded in the usual carrying places (c).

The shipowner or master will only be authorised to stow goods on deck: (1) by a custom binding in the trade or port of loading, to stow on deck goods of that class on such a voyage (d); or (2) by express agreement with the shipper of the particular goods so to stow them (e).

The effect of deck stowage not so authorised will be to set aside the exceptions of the charter or bill of lading (f), and to render the shipowner liable under his contract of carriage for damage happening to such goods (g).

(b) *Cuthbert v. Cumming* (1856), 11 Ex. 405.

(c) *Mitcheson v. Nicoll* (1852), 7 Ex. 929; *Royal Exchange Co. v. Dixon* (1886), 12 App. C. at p. 16. See *post*, Articles 90, 110. Where a ship was chartered, charterers to have "the full reach of the vessel's hold from bulkhead to bulkhead, including the half-deck": *Held*, that the freight for goods stowed on deck was due to the shipowners: *Neill v. Ridley* (1854), 9 Ex. 677. As to cross-bunkers, see *Jardine Matheson & Co. v. Clyde S.S. Co.* (1910), 15 Com. Cas. 193.

(d) Such as existed in *Could v. Oliver* (1837), 4 Bing. N. C. 134, and was attempted to be proved in *Newall v. Royal Exchange Co.* (1885), 33 W. R. 342, 868, and *Royal Exchange Co. v. Dixon* (1886), 12 App. C. 11.

(e) As in *Burton v. English* (1883), 12 Q. B. D. 218; *Wright v. Marwood* (1881), 7 Q. B. D. 62; *Johnson v. Chapman* (1865), 19 C. B. N. S. 563.

(f) The shipowner is probably in the same position as in the case of deviation (see Article 99). He is a bailor who has put the goods in a place which is not the agreed place for their keeping, as in *Lilley v. Doubleday* (1881), 7 Q. B. D. 510, which is approved in *Morrison v. Shaw, Savill*, (1916) 2 K. B. 783, as giving the principle on which liability is created by a deviation.

(g) *Newall v. Royal Exchange Co.*, *vide supra*. This case is also reported in 1 Times L. R. 178, 490, but in neither report are the grounds of the judgment very clear. Before Cave, J., at the trial, it was assumed that there was a binding custom to load on deck at the shipowner's risk: Cave, J., held that this custom excluded the terms of the bill of lading; that therefore the shipowner was liable as a common carrier, but that as the goods, owing to the custom, were properly stowed on deck, the master was the agent of the shipper in making a jettison, and the shipper's only right was to a general average contribution. In the Court of Appeal it was held that there was no such binding custom, that therefore the goods were improperly stowed on deck, and the master

If by his bill of lading the shipowner is authorized to carry either under deck or on deck, he is not bound to inform the shipper that he is going to carry on deck, so as to enable the latter to insure his goods as deck cargo (*h*).

The peculiar position of goods stowed on deck puts them in a special relation to claims for general average (*i*).

Case 1.—A ship was chartered to carry a “full and complete cargo.” Held, that the charterer was not entitled to load goods in the cabin (*j*).

Case 2.—Cotton was shipped under a bill of lading, excepting “jettison” and “stranding.” The cotton was shipped on deck improperly (the attempt to prove a custom to do so failing); owing to the ship’s stranding, the cotton was jettisoned, such jettison itself being proper. Held, that the goods being improperly stowed, the shipowner was not protected by the exceptions (*k*).

Article 49.—Ballast and Dunnage.

The shipowner having to furnish a seaworthy ship is bound to provide sufficient ballast and dunnage to make the ship seaworthy (*l*), and cannot require the charterer to provide such a cargo as will render it unnecessary for the shipowner to load ballast (*m*).

had not the authority of the shipper to jettison them; that consequently the remedy of the shipper was not for a general average contribution; and that the shipowner could not protect himself by the exceptions in the bill of lading, because those exceptions only applied to goods properly stowed. The House of Lords in *Royal Exchange Co. v. Dixon* (1886), 12 App. C. 11, upheld the view of the Court of Appeal.

(*h*) *Armour v. Walford* (1921), 27 Com. Cas. 37.

(*i*) *Vide post*, Articles 90, 110.

(*j*) *Mitcheson v. Nicoll* (1852), 7 Ex. 929.

(*k*) *Royal Exchange Co. v. Dixon*, *vide supra*.

(*l*) The ship is not ready to load until she is so provided: *Sailing Ship Lyderhorn v. Duncan*, (1900) 2 K. B. 929. The charterer sometimes contracts to ship ballast at ship’s expense; and, if so, may, in the absence of express stipulation, be liable for delay in such shipment: see for such stipulation, *Sanguinetti v. Pacific Steam Navigation Co.* (1877), 2 Q. B. D. 238. For special clause as to damage, see *The Cressington*, (1891), P. 152, where it was held that the certificate of a surveyor on the point before sailing is not conclusive against the charterer, even when the charter requires such a certificate to be furnished. Cf. *Sleigh v. Tyser*, (1900) 2 Q. B. 333.

(*m*) *Moorson v. Page* (1814), 4 Camp. 103; *Irving v. Clegg* (1894), 1 Bing. N.C. 53; *Southampton Colliery Co. v. Clarke* (1870), L. R. 6 Ex. 53; *Weir v. Union S.S. Co.*, (1900) A. C. 525.

The shipowner may carry freight-paying merchandise as ballast, if it takes no more room than ballast would have done, and does not interfere with the cargo shipped by the charterer (*n*).

Note.—Dunnage is the name given to the provision made in stowage to protect goods, by the use of various articles, from damage by contact with the bottom or sides of the vessel or with other goods. Shifting boards are to be treated as part of the ship's proper equipment rather than as dunnage (*o*).

Case 1.—A ship was chartered "to load a full and complete cargo of copper, tallow, hides, or other goods" (*p*). The charterer provided tallow and hides, but no copper. In consequence, the ship had to keep in her ballast, and so lost freight. *Held*, that the charterer was justified in shipping such a cargo (*q*).

Case 2.—A ship was chartered "to carry a full and complete cargo of merchandise, 100 tons of rice or sugar to be shipped previous to any other cargo as ballast." The charterer completed the loading with such light goods that more than 100 tons of ballast were required. *Held*, that the shipowner must supply it (*r*).

Article 50.—Loading and Stevedores.

In the absence of custom or express agreement it is the duty of the owner by his master to receive and stow properly the cargo, which is brought alongside at the risk and expense of the shipper (*s*). If the master or shipowner himself directs the stowage, he is bound to

(*n*) *Towse v. Henderson* (1850), 4 Ex. 890. *Semble*, the shipowner may use cargo as ballast or dunnage, provided it can be so stowed as to take no harm, though this will rarely happen: hence *dictum* of Sir R. Phillimore in *The Marathon* (1879), 40 L. T. 163, at p. 166.

(*o*) *Wye Co. v. Compagnie P. O.* (1922), 1 K. B. 617, in which charterers agreed to provide "all dunnage required."

(*p*) For other cases on special charters as to proportion of goods to be shipped, see *Cockburn v. Alexander* (1848), 6 C. B. 791; *Warren v. Peabody* (1849), 8 C. B. 800; *Capper v. Forster* (1837), 3 Bing. N. C. 938; *Southampton S. Colliery Co. v. Clarke* (1870), L. R. 6 Ex. 53.

(*q*) *Moorsom v. Page* (1814), 4 Camp. 103.

(*r*) *Irving v. Clegg* (1834), 1 Bing. N. C. 53.

(*s*) *Blaikie v. Stembridge* (1859), 6 C. B. N. S. 894; *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86. *Cf. Ballantyne v. Paton* (1912), Sess. Cas. 246.

exercise the same skill as a properly qualified stevedore (*t*). If he fails to do so, the shipper has an action against the owner or master (*s*).

As between shipper and shipowner, the employment of a stevedore by the owner does not relieve him from liability under his contract to carry as contained in the bill of lading, and, unless protected by express agreement, he will therefore be liable for damage done in or by negligent stowage (*u*), though he will have his remedy against the stevedore.

In all these cases it will be a good defence to show that the shipper was aware of the method of stowage, and made no objection (*w*).

Whether the charterer or owner is ultimately liable for bad stowage will depend on the terms of the charter as to stowage, but either the charterer or owner will have his remedy against the stevedore, unless the damage results from defects in gear supplied by the ship (*x*).

The owner who has employed a stevedore is not liable to persons damaged in the course of the stevedore's work, unless the damage results from defects in gear supplied by the ship. In any other case, their remedy, if any, is against the stevedore (*y*).

With a general ship loading cargo at more than one port, the shipowner at a later port may shift, and even temporarily put ashore, cargo loaded at an earlier port, if that is necessary for the proper stowage of the vessel on the voyage (*z*). And the exceptions of the bill of lading protect him as to damage sustained by such cargo while so removed (*z*).

(*t*) *Anglo-African Co. v. Lamzod* (1866), L. R. 1 C. P. 226; *Swainston v. Garrick* (1838), 2 L. J. Ex. 255, and see Note 1, *post*.

(*u*) *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106; *The St. Cloud* (1863), B. & L. 4; *Hayn v. Culliford* (1878), 4 C. P. D. 182.

(*w*) *Hutchinson v. Guion* (1858), 5 C. B. N. S. at p. 162; *Hovill v. Stephenson* (1830), 4 C. & P. 469; *Ohrloff v. Briscall* (1866), L. R. 1 P. C. 231; *Major v. White* (1835), 7 C. & P. 41.

(*x*) See cases *post*, p. 165, and notes. The owner is primarily liable to pay the stevedore. See *Eastman v. Harry* (1876), 33 L. T. 800.

(*y*) *Murray v. Currie* (1870), L. R. 6 C. P. 24.

(*z*) *Bruce, Marriott & Co. v. Houlder*, (1917) 1 K. B. 72.

Note 1.—Some of the above statements seem to conflict with the principle that the employer of an independent contractor incurs no liability for the acts of his contractor and his servants; and are certainly opposed to the *dictum* of Willes, J., in *Murray v. Currie* (a):—"The shipowner would not have been liable to the charterer (shipper), if the wrongful act of the stevedore had caused damage to any part of the cargo." But the principle is subject to exceptions, as when the act is unlawful or in its nature dangerous, or is work which the employer is bound by statute or common law to perform, or is controlled or interfered with and directed by the employer (b). Now it is clear that the work of loading is one which the carrier is legally bound to perform under his contract of carriage, and he cannot get rid of his liability by employing an independent contractor, though he may have a remedy over against the contractor. Persons, however, damaged by the contractor's negligence, apart from the contract of carriage, can only sue the contractor, and this is the explanation of *Murray v. Currie* (a); as the work was not so dangerous, *per se*, as to bring it within the exception, nor did the employer control the contractor's work. The ordinary directions to a stevedore, as to where he should stow goods, not involving instructions as to how he should stow them, will not be sufficient to bring the employer within this exception. The *dictum* of Willes, J., is therefore, it is submitted, unsound.

Note 2.—It is very usual to find a provision in charter-parties whereby the charterer secures the right to appoint a stevedore, and under such a clause a question often arises whether a stevedore so appointed is, as between the owners and the charterers (c), the servant of the owners or the charterers. In *Blaikie v. Stembridge* (d), where there was

(a) (1870), L. R. 6 C. P. 24.

(b) See Macdonell on "Master and Servant," pp. 262—270.

(c) As between the owners and consignees or indorsees, if the latter are ignorant of the provisions of the charter, and if under the charter the owners retain possession and control of the ship, an appointment of a stevedore by the charterers will not absolve the owners from responsibility for bad stowage: *Swainston v. Garrick* (1833), 2 L. J. Ex. 255; *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86.

(d) (1859), 6 C. B. N. S. 894, Ex. Ch. 904. In *Swainston v. Garrick* (v.s.), where, by an arrangement outside the charter, the charterers had appointed their own stevedore, the claim was by the owners against the master, to recover the amount of damages which the owners had been found liable to pay to certain consignees for negligent stowage. It was held that the master's *prima facie* obligation to his owners of careful stowage was removed by their allowing the charterer's stevedore to take his place in the matter.

a clause in the charter, "stevedore to be appointed by the charterer but to be paid by and act under the captain's orders," and the claim was by a shipper against the master not upon a bill of lading, but in tort, it was held that the stevedore was not the master's servant. In the Exchequer Chamber the decision in favour of the master was affirmed on the ground that he had committed no breach of contract or of duty, but Bramwell, B., doubted whether the stevedore was not the master's (the owner's?) servant. In *The Catherine Chalmers* (e), with a clause that the vessel should "be stowed by charterer's stevedore at the expense and risk of the vessel," Sir R. Phillimore, upon the authority of *Blaikie v. Stenbridge* (f), held that the owners were not responsible to the charterers for bad stowage. But this decision must be erroneous, for it gives no effect to the words "and risk," which were doubtless inserted in view of this very point (g). In *Brys & Gylsen v. Drysdale* (h), with the clause, "Charterers are to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master," the charterers were held liable for dead freight, when owing to the fault of the stevedore less than a full cargo was loaded.

On the other hand, there have been several cases in which it has been decided that the stevedore was the servant of the shipowners. In *Sack v. Ford* (i), the charter contained a clause, "the charterers are to have liberty to employ stevedores and labourers to assist in the . . . stowage of the cargo; but such stevedores being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage . . . the liability of owners shall remain the same as if they were carrying out a voyage on their own account." The charterers sued the owners for negligent stowage, and under the special terms of the clause, succeeded. In *The Helene* (j), the claim for negligent stowage was made by indorsees of a bill of lading against the shipowners. The charter contained a clause, "charterers being allowed to appoint a head stevedore, at the expense and under the

(e) (1875), 32 L. T. 847.

(f) See note (d), p. 160, *ante*.

(g) In *The Ferro*, (1893) P. 38, the words were the same, and it was apparently assumed that they would render the shipowner liable. The claim, however, was being put forward by a shipper ignorant of the charter.

(h) (1920), 4 Ll. L. Rep. 24.

(i) (1862), 13 C. B. N. S. 90.

(j) (1865), B. & L. 415.

inspection and responsibility of the master for proper stowage"; and it was proved that the charterer, who was the shipper, saw and approved of the manner of stowage. The plaintiffs recovered, and Dr. Lushington intimated his opinion that under this clause the charterer might have recovered against the owners (*k*). In *Steinman v. Angier* (*l*) the stevedore was appointed by the charterer but paid by the shipowner. It was held that the shipowner was not protected by an exception of "thieves" in the bills of lading against a claim for goods stolen after loading by the stevedore's men; and the principle of the decision was that such an exception does not cover thefts by the owner's servants. In *Harris v. Best* (*m*) the charterparty provided: "Stevedore to be appointed by the charterers in London only, but employed and paid for by owners at current rate." In a claim by the owners for demurrage, alleged in part to be due to the conduct of the stevedore thus appointed, it was held that the stevedore was not the servant of the charterers (*n*).

Of all the above cases, it will be noticed that *The Catherine Chalmers*, *Sack v. Ford*, and *Harris v. Best* are the only ones in which the question was raised as between charterers and owners.

No general rule, it is submitted, can be derived from these cases, nor from the principles laid down in *Quarman v. Burnett* (*o*). Probably each case depends upon its own circumstances, and, to use the words of Esher, M.R., in *Harris v. Best* (*p*): "Sometimes it is stipulated that the charterer is to employ and pay a stevedore, and if he is to employ a stevedore to stow the cargo, then he is liable for the consequences of bad stowage. There is also another way in which the arrangement is made. The charterer may desire to have good stowage, but yet not to be under any obligation for the stevedore's actions; the charterer makes a contract with the shipowner that the shipowner shall employ a stevedore to be appointed or nominated by the charterer. In such a case the shipper nominates a good

(*k*) (1865), B. & L. at p. 424. In the Privy Council (*ibid.* 429) the judgment was reversed on the ground that there was no negligent stowage in fact, but no opinion was given upon the point now in consideration.

(*l*) (1891), 1 Q. B. 619. The precise words of the charterparty as to the stevedore do not seem to be reported.

(*m*) (1892), 7 Asp. M. L. C. 272.

(*n*) See also *Andersen v. Crundall* (1898), 14 T. L. R. 256; and *Royal Mail Co. v. Macintyre* (1911), 16 Com. Cas. 231.

(*o*) (1840), 6 M. & W. 499.

(*p*) 7 Asp. M. L. C. at p. 274.

stevedore, and then leaves him to be the servant of the shipowner, just as if he had been nominated by the shipowner." When it is considered that *prima facie* it is the duty of the shipowner to secure proper stowage of the cargo, it seems probable that in most cases the latter rather than the former of the results described in this passage is the right one.

Case 1.—A ship was chartered by C. to load a cargo not exceeding what the ship could reasonably carry, "C.'s stevedore to be employed by the ship, and the cargo . . . to be brought alongside at C.'s risk and expense." C. did not appoint a stevedore, and the owners did not load a full cargo. *Held*, that the condition that C. should appoint a stevedore was not a condition precedent; that, even if he did not, the owners and their master were bound to take on board as much cargo as the ship could reasonably carry, and that the master was bound to use the same skill as a qualified stevedore in stowing it (q).

Case 2.—C. chartered a ship from A., with a clause, "stevedore of outward cargo to be appointed by charterer, but to be paid by and act under captain's orders." Other shippers, knowing of the charter, shipped goods which were stowed by the stevedore appointed by the charterer; the captain did not interfere with their stowage. *Held*, that the shipper could not sue the master for bad stowage (r).

Case 3.—A. chartered a ship to C., to sail to X., and load from C.'s agents there "cargo to be stowed at merchant's risk and expense." Goods were shipped by F., ignorant of the charter. The stevedore was appointed by the charterers, though ultimately paid by owners. *Held*, that F. could sue A. on bills of lading signed by the master (s).

Case 4.—K., a stevedore, in unloading A.'s ship, employed L., a member of A.'s crew, assigned to him by A., but under the orders of and paid by K. Through L.'s negligence, M., a fellow-workman, was injured. *Held*, that K., and not A., was liable (t).

Case 5.—C. sued A. and E., his captain, for negligent stowage of A.'s ship, chartered by C., whereby damage was done to the cargo. A. proved that C. and his broker were on board from time to time during the loading, saw what was being done, and made no objection to it. *Held*, a good defence (u).

(q) *Anglo-African Co. v. Lamzed* (1866), L. R. 1 C. P. 226.

(r) *Blaikie v. Stenbridge* (1859), 6 C. B. N. S. 894.

(s) *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86. *Semble*, that A. could sue C. for damages F. recovered from him. *Sed cf. Baumvill v. Gilchrest*, (1892), 1 Q. B. 253, where the ship was out of its owner's possession and control; here the owner would not be liable.

(t) *Murray v. Currie* (1870), L. R. 6 C. P. 24.

(u) *Ohrloff v. Briscall* (1866), L. R. 1 P. C. 231; *Union Castle Co. v. Borderdale Co.*, (1919) 1 K. B. 612. But the knowledge of the lighter-man who brought the goods to the ship will not be sufficient to affect the shipper: *Figlia Maggiore* (1868), L. R. 2 A. & E. 106.

Article 51.—Mate's Receipt.

On delivery of goods by a shipper to the shipowner or his agent, the shipper will, unless there is a custom of the port to the contrary (*w*), obtain a document known as a "*mate's receipt*." Apart from special contract (*x*) the goods are then in the shipowner's possession and at his risk (*y*).

As a general rule the person in possession of the mate's receipt, where one exists, is the person entitled to bills of lading, which should be given in exchange for that receipt, and he can sue for wrongful dealing with the goods. The shipowner will be justified in delivering bills of lading to him if he has received no notice of and does not know of other claims (*z*).

But the mate's receipt is also a recognition of property in any person named therein as owner, an acknowledgment that the shipper holds the goods on his account (*a*). The master will therefore be justified in delivering bills of lading to such a person; or to a person proved to be owner of the goods (*b*), even though the mate's receipt

(*w*) Thus in the port of London a "*mate's receipt*" is only given for water-borne goods, and not for goods sent to the docks by land. For these latter the corresponding document is the *wharfage note* issued by the Port Authority, who receive a *mate's receipt* from the ship.

(*x*) See Note 2, p. 167. Such special contract may also be contained in the shipping note tendered by the shipper and signed by or for the shipowner. Thus in *Armstrong v. Allan* (1892), 8 Times L. R. 613, the shipping note contained the clause "no goods to be received on board unless a clean receipt can be given." The captain received the goods, but would not give "a clean receipt"; and the shipper was held entitled to demand his goods back.

(*y*) *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Cobban v. Downe* (1803), 5 Esp. 41. The shipowner will hold them on the terms of his usual bill of lading, even before its signature; but this is frequently expressly provided for in the mate's receipt. Cf. *De Clermont v. General Steam Navigation Co.* (1891), 7 Times L. R. 187. *Semble*, that the risk is only that of an ordinary bailee until shipment: *Nottebohn v. Richter* (1886), 18 Q. B. D. 63.

(*z*) *Craven v. Ryder* (1816), 6 Taunt. 433; *Thompson v. Trail* (1826), 6 B. & C. 36; *Falke v. Fletcher* (1865), 18 C. B. N. S. 403.

(*a*) *Evans v. Nichol* (1841), 3 M. & G. 614; *Craven v. Ryder* (1816), 6 Taunt. 433. The majority of receipts do not contain an owner's name.

(*b*) *Cowasjee v. Thompson* (1845), 5 Moore, P. C. 165.

is not produced, if he has received no notice of other claims and is satisfied the goods are on board (c).

Mere indorsement or transference of the mate's receipt without notice to the shipowner or his agent does not pass the property in the goods, and a custom to that effect has been held bad (c).

Statements in the mate's receipt are not conclusive against the shipowner, but throw on him the burden of disproving them (d).

Note 1.—A *clean receipt* is one in which the acknowledgment of the receipt of the goods is not qualified by any reservation as to their quality or quantity (e). So also a *clean bill of lading* is one in which there is nothing to qualify the admission that so many packages are shipped in good order and well conditioned (f).

Note 2.—The bill of lading sometimes provides expressly when the ship's responsibility shall commence; e.g., "when goods are taken in from a lighter, when the goods are over the ship's deck level with the rail"; or "it is expressly stipulated that the goods mentioned in this bill of lading, while awaiting shipment on any quay or lighter in Liverpool, shall be at risk of shipper"; or "the cargo to be taken from the bank of the river . . . by the ship's boats and crew at ship's risk and expense" (g).

The shipowner usually requires as a condition of his assuming liability for the goods, that they shall be correctly marked, e.g.: "The shippers to mark each package before shipment with the name of the port of destination in letters of two inches in length at least, otherwise the owners to be free from all responsibility for the goods"; or, "The ship will not be responsible for correct delivery, unless each package be distinctly, correctly, and permanently marked by the merchant before shipment with a mark, number, and address, and also with the name of the port of delivery,

(c) *Hathesing v. Laing* (1873), L. R. 17 Eq. 92. In practice lightermen and agents frequently detain the *mate's receipt* as security for disputed accounts; but shipowners in these cases often disregard the *mate's receipt* and deliver bills of lading to the shipper.

(d) *Biddulph v. Bingham* (1874), 30 L. T. 30. Contrast the effect of a statement by the master within his authority. See Article 20.

(e) *Armstrong v. Allan* (1892), 8 Times L. R. 613.

(f) *Restitution S.S. Co. v. Pirie* (1889), 61 L. T. at p. 333.

(g) See *Nottebohm v. Richter* (1886), 18 Q. B. D. 63; and contrast *Dampskibsselskabet S. v. Calder* (1911), 17 Com. Cas. 97.

which last must be in letters not less than two inches long" (h).

Case 1.—F., shippers, delivered to A.'s servants on the quay goods for shipment by A.'s vessel alongside, and received a mate's receipt; one of the cases was left behind. *Held*, that A. was liable for its loss (i).

Case 2.—F. sold sugar *f. o. b.* to H.: F. shipped the sugar on A.'s ship, receiving a "mate's receipt"—"Received on board the X, for and on account of F." H. resold to K.; K. obtained bills of lading from A.'s captain. Before the ship sailed H. failed. F. claimed to stop *in transitu*. The jury found that by shipping under the mate's receipt F. did not intend to divest his lien. *Held*, that F. was entitled to the bills of lading, and not K., the property being still in F. (j).

Case 3.—F. sold goods to H. *f. o. b.*, took a bill from H. in payment, and shipped them on A.'s ship, getting mate's receipt. H. failed, while the bill was running. F. claimed to stop *in transitu*. A.'s captain had made out the bills of lading in H.'s name, without production of mate's receipts. *Held*, that, F. being absolutely paid by bill (k), the right to stop *in transitu* was gone; that the property was therefore in H., and that the possession by F. of the mate's receipts was immaterial (l).

Case 4.—H., acting as agent for C. F., bought goods and shipped them in A.'s vessel, chartered to C. F., obtaining a mate's receipt for them. C. F. indorsed the receipts to H., who kept them as security for his payment by C. F., but gave no notice to A.'s captain. C. F. obtained bills of lading from the captain, and endorsed them to a bank. The bank and H. both claimed the goods. H. set up a custom of Bombay that mate's receipts were negotiable instruments, indorsement of which passed the property, and that captains were bound not to give bills of lading except on the production of the mate's receipt. *Held*, that such a custom was bad; that A.'s captain, knowing C. F. to be the owners of the goods, and having no notice of any other claim, was justified in giving bills of lading to C. F., and that the holders of the bills of lading had precedence over the holder of the mate's receipts (m).

(h) For an example of the working of a similar exception, see *Cox v. Bruce* (1886), 18 Q. B. D. 147; *Parsons v. New Zealand S.S. Co.*, (1901) 1 K. B. 548. In the latter case it was held by Smith, M.R., and Collins, L.J., Romer, L.J., doubting, that "correctly marked" meant "marked in accordance with the marks on the bill of lading."

(i) *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499. The delivery must be to a recognised agent of the shipowner, as master, mate, super-cargo, or dock company, not merely on board the ship, or to the crew: *Cobban v. Downe* (1803), 5 Esp. 41; *Mackenzie v. Rowe* (1810), 2 Camp. 482.

(j) *Craven v. Ryder* (1816), 6 Taunt. 433.

(k) See Article 64.

(l) *Cowasjee v. Thompson* (1845), 5 Moore, P. C. 165.

(m) *Hathesing v. Laing* (1873), L. R. 17 Eq. 92.

Case 5.—F. shipped goods in A.'s ship, and received a mate's receipt: "Received on board the A. from F., to be delivered to G." F. had arranged with G. that these goods should be consigned to him as security for advances, and forwarded the receipt to G. F. failed, and A. claimed a lien on the goods for other debts due from F. to A. *Held*, that G., as holder of the mate's receipt, acknowledging that the goods were held to be delivered to him, was entitled to sue A. for the goods (n).

Case 6.—C. verbally chartered a ship from A., and loaded in it iron supplied by H. A.'s mate gave a receipt for 330 tons; there was no bill of lading. On arrival there were only 326½ tons of iron. C. had paid H. for 330 tons, on the mate's receipt. C. sued A. for the price of 3½ tons short. A.'s mate proved that he had delivered all that he had received. *Held*, that A. was not liable, the mate's receipt being only *prima facie* evidence, which A. could contradict (o).

Article 52.—Shipped in Good Condition.—Weight, Value, and Contents unknown.—Quality and Quantity unknown.

The insertion, in addition to the first, of either or both of the last two clauses in the bill of lading by the master or broker repudiates his liability for any description of the weight or contents, etc., of the goods contained in the bill of lading; but he is bound to carry and deliver safely the goods received by him, whatever their contents or weight may be (p).

These clauses only admit as against the shipowner that a package was shipped externally to all appearances in good condition (q). A mate's receipt (r) or bill of

(n) *Evans v. Nichol* (1841), 3 M. & G. 614.

(o) *Biddulph v. Bingham* (1874), 30 L. T. 30.

(p) *New Chinese Co. v. Ocean S.S. Co.*, (1917), 2 K. B. 664; *Jessel v. Bath* (1867), L. R. 2 Ex. 267; *Lebeau v. General Steam Navigation Co.* (1872), L. R. 8 C. P. 88; *Craig Line v. North British Co.* (1921), Sess. Cas. 114. As to burden of proof of non-shipment, see *Smith v. Bedouin Co.*, (1896), A. C. 70; *Sanday v. Strath S.S. Co.* (1920), 26 Com. Cas. 163, 277; and Article 20.

(q) *The Peter der Grosse* (1875), 1 P. D. 414; but see *Craig v. Delargy* (1879), 6 Sc. Sess. Cas. 4th Ser. 1269; *Witzler v. Collins* (1879), 35 Am. Rep. 327.

(r) *Armstrong v. Allan* (1892), 8 Times L. R. 613.

lading (s) which qualifies this admission is not a "clean receipt" or a "clean bill of lading."

If such goods are delivered damaged the shipper must give *prima facie* evidence either that they were shipped in good condition internally, or that the damage resulted from some cause for which the shipowner is liable (t).

A statement in the bill of lading that goods were "shipped in good order and condition" will estop the shipowner against an indorsee for value of the bill from proving that they were not in apparent good order and condition (u).

As to the obligation under the American Harter Act to issue a bill of lading stating marks, number of packages, or quantity and apparent condition, see the Act in Appendix V., p. 484.

Note.—The common phrase in a bill of lading, "marked and numbered as per margin," is of respectable antiquity. "Marked all with the mark in the margent" occurs in a bill of lading of 1541 by *The Mary*, and in one of 1544 by *The John Evangelyst* (x).

Case 1.—D., C.'s broker, signed a bill of lading to F. for thirty-three tons of manganese; the bill contained the printed words: "Weight, contents, and value unknown." On arrival the ship

(s) *Restitution S.S. Co. v. Pirie* (1889), 61 L. T. at p. 333, and see Note 1, p. 167.

(t) *The Ida* (1875), 32 L. T. 541; *The Prosperino Palasso* (1873), 29 L. T. 622; which, however, is reversed in *The Ida*, so far as it laid down as a rule of law that the shipper must always prove affirmatively good condition on shipment. He must *prima facie* negative inherent vice of the goods, which he can do by shewing that the damage is obviously due to an external cause. See also *Williams v. Dobbie* (1884), 11 Sc. Sess. Cases, 4th Ser. 982. The non-arrival of the vessel at her destined port is not even *prima facie* evidence of negligence: *Boyson v. Wilson* (1816), 1 Stark. 236. The arrival of the vessel, but non-arrival of the goods, is such *prima facie* evidence: *The Xantho* (1886), 2 Times L. R. 704. See also *Baxter's Leather Co. v. Royal Mail Co.*, (1908) 1 K. B. 796, 2 K. B. 626.

(u) *Compania, &c. v. Churchill*, (1906) 1 K. B. 237. "Quality unknown" does not necessarily modify the effect of "shipped in good condition," though in some cases it may do so: *ibid.* See also *Martineaus v. Royal Mail Co.* (1912), 17 Com. Cas. 176; and *Crawford v. Allan Line*, (1912) A. C. 130, at p. 143.

(x) Marsden, *Select Pleas in the Admiralty Court* (Selden Society, 1892), Vol. I., at pp. 112, 126.

only delivered twenty-six tons, and it was admitted that no more had been shipped. *Held*, that such a bill only meant "a certain quantity of manganese has been shipped which for purposes of freight is said by the shipper to amount to so much, but I do not pretend or undertake to know whether the statement of weight is correct" (y).

Case 2.—F. delivered to A. for shipment goods described in the bill of lading F. tendered for signature as "linen goods." A.'s captain signed the bill of lading, after stamping it, "Weight, value, and contents unknown." The goods were really silk goods, the misdescription being inadvertent and not fraudulent. In transit two pieces of silk were lost, and F. claimed their value from A. *Held*, that the effect of the words stamped was to do away with the description in the bill of lading, the contract being to carry the package whatever its contents might be and declining to be bound by any statement of its contents, and that A. was, therefore, liable (z).

Case 3.—Goods were shipped under a bill of lading, "Shipped in good order and condition . . . weight, contents, and value unknown." They were delivered dirty externally, and damaged obviously from some external source. *Held*, that the bill of lading was evidence that externally the goods had been shipped in good order and condition to the eye, and that, as it was proved *primâ facie* that the damage resulted from some external source, the shipowners, to free themselves, must prove that the goods were damaged when shipped (a).

Case 4.—Cotton seed was shipped under a bill of lading "in good order and well conditioned; quantity and quality unknown." *Held*, that to render the shipowner liable for the delivery of damaged goods, the shipper must prove either shipment in good condition or damage sustained on the voyage by a cause not within the exceptions (b).

Case 5.—Seven hundred pieces of pitch pine sawn timber were shipped under a bill of lading stating: "shipped in good order

(y) *Jessel v. Bath* (1867), L. R. 2 Ex. 267. See also *New Chinese Co. v. Ocean S.S. Co.*, (1917) 2 K. B. 664; *Tully v. Terry* (1873), L. R. 8 C. P. 679; *Covas v. Bingham* (1853), 2 E. & B. 836, where, on a sale of cargo afloat by bill of lading, *held*, that payment was to be made on the amount in the bill of lading, and not the amount actually delivered; and Article 141, *post*.

(z) *Lebeau v. General Steam Navigation Co.* (1872), L. R. 8 C. P. 88. The case of *Bradley v. Dunipace* (1862), 1 H. & C. 521, which caused much difference of judicial opinion at the time, is doubtful law now, unless it can be explained on the ground that a parcel of different identity was delivered. Cf. *Collins, L.J., Parsons v. New Zealand Co.*, (1901) 1 Q. B. 548, at p. 567.

(a) *The Peter der Grosse* (1875), 1 P. D. 414. If the damage had not been obviously external, the shipper must have connected it in some way with the shipowner. Cf. *Crawford v. Allan*, (1912) A. C. 130, at pp. 143 and 147.

(b) *The Ida* (1875), 32 L. T. 541.

and condition; . . . quality unknown." *Held*, (1) that "quality unknown" did not modify the admission as to good condition; (2) that the shipowner was bound by the admission as against an indorsee of the bill of lading (*c*).

Article 53.—Cesser Clause.

Charters, especially those made by English agents for foreign principals, frequently contain a clause to the effect that the charterer's liability shall cease on shipment of the cargo. This clause, known as the "lien and exemption clause," or "cesser clause" (*d*), is usually inserted in consideration of the granting to the shipowner of a lien, which he would not otherwise possess, on the cargo for demurrage and dead freight (*e*).

The tendency of the Courts is to hold that the exemption granted to the charterer is co-extensive with the lien thus conferred on the shipowner (*f*).

Where therefore no lien at all has been granted to the shipowner, the Courts have been slow to relieve the charterer from liabilities arising either before or after the shipment of the cargo (*g*); but, where the words make it clear that such was the intention of the parties, they have held the charterer relieved (*h*), even though the effect of such a decision was to leave the shipowner without remedy (*i*).

(*c*) *Compania, &c. v. Churchill*, (1906) 1 K. B. 237. *Cf. Martineau v. Royal Mail Co.* (1912), 17 Com. Cas. 176.

(*d*) *E.g.*: "This charter being entered into on behalf of others, all liability of the parties signing to cease after shipment of cargo, in consideration of which it is agreed that for the payment of all freight, dead freight, and demurrage, the said owner shall have an absolute lien and charge on the said cargo."

(*e*) See Article 161.

(*f*) *Clink v. Radford*, (1891) 1 Q. B. 625 (C. A.); *Hansen v. Harrold*, (1894) 1 Q. B. 612 (C. A.); *Dunlop v. Balfour*, (1892) 1 Q. B. 507: see especially the judgment of Wright, J. See also *Gray v. Carr* (1871), L. R. 6 Q. B. at p. 544, and *French v. Gerber* (1877), 2 C. P. D. at p. 250.

(*g*) *Christoffersen v. Hansen* (1872), L. R. 7 Q. B. 509.

(*h*) *Oglesby v. Yglesias* (1858), E. B. & E. 930; *Milvain v. Perez* (1861), 3 E. & E. 495.

(*i*) It is clear that the charterer is relieved by the cesser clause from liabilities accruing after the shipment of the cargo; there has been a

Similarly where a lien has been granted to the shipowner the Courts have held the charterer excused from claims for which the shipowner has a lien (*k*) or some other security on the cargo (*l*), but have treated him as liable for claims for which the shipowner has no such lien (*m*), or which the express words of the clause show that he was intended to be liable for (*n*).

The rule that the cesser clause does not protect the charterer against claims for which no lien is given by the bill of lading applies even when the form of bill of lading to be signed is specified in the charterparty, and one is signed in that specified form (*o*).

The fact that the charterer is also the consignee of the cargo will not destroy his exemption under such a clause (*p*), unless he is consignee under a bill of lading incorporating and so reviving the liabilities of the charter, when the cesser clause will be held inapplicable to the new contract as regards liabilities accruing after the shipment of the cargo (*q*).

conflict of opinion whether he was in addition relieved from liabilities accruing before such shipment; and, though the authorities now establish that he is, if a corresponding lien is given to the shipowner, yet several judges, and notably Lord Esher, while recognising that the authorities decide this, have thought that on principle the decisions should have been the other way. See *per* Brett, J., in *Gray v. Carr*, L. R. 6 Q. B. at p. 537, and in *Kish v. Cory* (1875), L. R. 10 Q. B. at p. 559; also *per* Coleridge, L.C.J., in the latter case, at p. 557, and *per* Grove, J., at p. 562; but, as the latter learned judge says, "The authorities, however, are too strong to be overruled even by a Court of Error."

(*k*) *Francesco v. Massey* (1873), L. R. 8 Ex. 101; *Kish v. Cory* (1875), L. R. 10 Q. B. 553; *Bannister v. Breslauer* (1867), L. R. 2 C. P. 497; *Sanguinetti v. Pacific Steam Navigation Co.* (1877), 2 Q. B. D. 238.

(*l*) *French v. Gerber* (1877), 2 C. P. D. at p. 250.

(*m*) *Clink v. Radford*, (1891) 1 Q. B. 625; *Hansen v. Harrold*, (1894) 1 Q. B. 612; *Dunlop v. Balfour*, (1892) 1 Q. B. 507; *Lockhart v. Falk* (1875), L. R. 10 Ex. 132; *Francesco v. Massey*, *vide supra*.

(*n*) *Lister v. Van Haansbergen* (1876), 1 Q. B. D. 269; *Pederson v. Lotinga* (1857), 28 L. T. O. S. 267.

(*o*) *Jennesen v. Secretary of State for India*, (1916) 2 K. B. 702.

(*p*) *Sanguinetti v. Pacific Steam Navigation Co.* (1877), 2 Q. B. D. 238.

(*q*) *Gullischen v. Stewart* (1884), 13 Q. B. D. 317 (demurrage at port of discharge); *Bryden v. Niebuhr* (1884), 1 C. & E. 241 (demurrage at port of call); which, it is submitted, overrule *Barwick v. Burnyeat* (1877), 36 L. T. 250.

Case 1.—A ship was chartered with no provision as to rate of loading or demurrage at port of loading, but with such provisions relating to the port of discharge, and also a clause: "The charterer's liability under this charter to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage." On a claim by the shipowners for damages for detention at the port of loading, *held*, that as no lien was given for such damages under the name "demurrage," the cesser clause did not free the charterers (r).

Case 2.—A ship was chartered at a lump freight, the liability of charterers to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under the charter. The charterers had under the charter the privilege of rechartering the vessel at any rate of freight without prejudice to the charter, the captain to sign bills of lading . . . at the current or any rate of freight without prejudice to the charter.

The charterers rechartered and presented bills of lading showing freight payable by weight delivered in London for a sum sufficient to satisfy the balance of freight due under the charter. The captain signed them. On the voyage the cargo diminished in weight so that the bill of lading freight (payable on weight delivered in London) was insufficient to cover the freight due under the charter, leaving a balance still unpaid. The shipowners sued the charterers for this balance. The charterers pleaded the cesser clause. *Held*, no defence, as the cesser clause only relieved the charterers to the extent to which an effective lien was given to the shipowners (s).

Note.—The importance of the decision in *Hansen v. Harrold* (s) is in the frequent cases where, there being a cesser clause in the charter with a lien for demurrage, demurrage is alleged to have been incurred at the port of loading, but is disputed. The captain is asked under the terms of the charter to sign bills of lading as presented, which give no lien for demurrage. He fears that if he does so, the cesser clause will prevent his owners from recovering demurrage at all. It appears to follow from *Hansen v. Harrold* (t) that if, owing to the terms of the bill of lading, the shipowner has no effective lien for demurrage, the charterer will not be relieved by the cesser clause, from a claim for demurrage. See, for a dispute of this kind settled by agreement, *Anderson v. English Co.* (u); other similar cases have arisen in arbitrations. The decision in

(r) *Clink v. Radford*, (1891), 1 Q. B. 625 (C. A.).

(s) *Hansen v. Harrold*, (1894) 1 Q. B. 612 (C. A.): see *Williams v. Canton Co.*, (1901) A. C. 462.

(t) (1894) 1 Q. B. 612.

(u) (1895), 1 Com. Cases, 85.

Janentsky v. Langridge (w) does not conflict with this, for if the cesser clause did not operate because there was no lien for the freight unpaid, yet the charterers were only liable on right delivery of the cargo which had not taken place. The chief difficulty in the interpretation of the clause arises from the term "demurrage," which strictly means an agreed and certain sum payable under the contract for delay beyond the agreed lay-days; but may also be taken more widely to mean the unliquidated damages payable for breach of the implied covenant to load within a reasonable time, known in law as "damages for detention" (x), and the term appears often to be used commercially in this wider sense.

The cases, though contradictory, appear to yield the rules laid down in the next article, as to charters containing a "cesser clause," and a lien for "demurrage."

Article 54.—Demurrage and Cesser Clause.

Where no demurrage in the strict sense of the term (y) is stipulated for in the provisions as to lay-days, but a lien for demurrage is given by the cesser clause to the shipowner, such a lien will include damages for detention at the port of loading, and the charterer will therefore not be liable for such damages (z).

Where demurrage in the strict sense of the term is stipulated for in the charter, after provisions as to both loading and discharging, it applies to both: if then a lien for demurrage is given together with a cesser clause, such a lien applies only to demurrage in the strict sense (a) [and not to damages for detention beyond the agreed days on demurrage] (b). The charterer will therefore be freed from liability for demurrage at the

(w) (1895), 1 Com. Cases, 90.

(x) *Gray v. Carr* (1871), L. R. 6 Q. B. 544, 551.

(y) Agreed damages to be paid for the delay of the ship in loading or unloading beyond an agreed period, such delay not being caused by default of the shipowner.

(z) *Bannister v. Breslauer* (1867), L. R. 2 C. P. 497; only to be supported on this ground: cf. *per Bowen, L.J.* in *Clink v. Radford*, (1891) 1 Q. B. at p. 631, see post, p. 181.

(a) *Kish v. Cory* (1875), L. R. 10 Q. B. 553.

(b) *Gray v. Carr* (1871), L. R. 6 Q. B. 522.

port of loading (c) [but not for damages for detention at the port of loading (d)] (e).

Where there is a stipulation for demurrage at the port of discharge, but none at the port of loading, the term "demurrage" can only be taken to apply to the port of discharge; and the shipowner will therefore have no lien for damages for detention at the port of loading, while the charterer will be liable for such damages (f).

Note.—These rules may also be put in another way. Where a lien for demurrage is given to the shipowner by a charter containing a "cesser clause," the charterer will be freed by the "cesser clause" from all liability for demurrage or detention at the port of discharge.

At the port of loading his liabilities will vary according to the stipulations of the charter as to demurrage. Stipulations for demurrage at the port of loading may be either (g):—

(1.) *Exhaustive*: as "ten days for loading, and demurrage at £2 per diem afterwards," which provides for all delay.

(2.) *Partial*: as "ten days to load, ten days on demurrage at £2 per diem," when all delay after twenty days will give rise to "damages for detention"; or "demurrage at £2 per diem" (h), when demurrage will begin at a time unascertained, except that such time must be reasonable.

(3.) *None*: as "ten days to load," or "load according to the custom of the port," or simply "load," where all delay will be met by damages for detention.

With regard, then, to the port of loading:

(1.) If there is an *exhaustive* stipulation for demurrage, the charterer will be freed from it by the cesser clause, the shipowner having a co-extensive lien: *Sanguinetti v. Pacific Steam Navigation Co.* (i).

(2.) If there is a *partial* stipulation for demurrage, the

(c) *Francesco v. Massey* (1873), L. R. 8 Ex. 101; *Kish v. Cory*, *vide supra*.

(d) *Gray v. Carr*; *Francesco v. Massey*, *vide supra*.

(e) The parts in brackets are not yet clear law: see *Note*, *infra*, p. 178.

(f) *Clink v. Radford*, (1891) 1 Q. B. 625; *Dunlop v. Balfour*, (1892) 1 Q. B. 507; *Lockhart v. Falk* (1875), L. R. 10 Ex. 132; *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C., 4th Ser. 658.

(g) See also Article 121, *post*.

(h) *Cf. Harris v. Jacobs* (1885), 15 Q. B. D. 247.

(i) (1877), 2 Q. B. D. 238.

charterer will be freed from his liability for demurrage: *Kish v. Cory* (k); *Francesco v. Massey* (l); but, as the shipowner has no lien for damages for detention: *Gray v. Carr* (m); the charterer will not be freed from his liability for such damages; *Francesco v. Massey* (l).

(3.) If there is no stipulation for demurrage at the port of loading, but there is one for the port of discharge, the shipowner will not have any lien for damages for detention at the port of loading: *Gray v. Carr* (m); the charterer will not be freed from his liability for them: *Lockhart v. Falk* (n).

(4.) If there is no stipulation for demurrage either at the port of loading or port of discharge, but a lien for demurrage, it will be construed to give the shipowner a lien for damages for detention at the port of loading, and therefore to excuse the charterer from liability for such damages: *Bannister v. Breslau* (o).

Case 1.—A ship was chartered to load in regular turn in the customary manner . . . "this charter being concluded by C. on behalf of another party resident abroad, it is agreed that all liability of C. in every respect and as to all matters and things as well before as during and after the shipping of the cargo shall cease as soon as he has shipped the cargo." Held, that by this clause the charterers, on shipment of the cargo, were protected from liability for delay in loading (p).

Case 2.—A ship was chartered by C. "to load in fifteen working days, the vessel to be discharged at the rate of thirty-five tons per working day, and ten days on demurrage over and above her said lay-days, C.'s liability to cease when ship is loaded, the captain having a lien upon the cargo for freight and demurrage." A claim was made against C. for five days' demurrage, and fourteen days' detention beyond the days on demurrage. On the trial C. was held liable both for demurrage and for damages for detention. He appealed as to demurrage, admitting he was liable for damages for detention. Held, that as the owner had a lien for demurrage, C. was not liable for it (q).

Case 3.—A ship was chartered by C. to carry rice, calling at a port for orders "to be forwarded within forty-eight hours after

(k) (1875), L. R. 10 Q. B. 553.

(l) (1873), L. R. 8 Ex. 101, and see the reasoning in *Clink v. Radford*, (1891) 1 Q. B. 625, and *Dunlop v. Balfour*, (1892) 1 Q. B. 507.

(m) (1871), L. R. 6 Q. B. 522.

(n) (1875), L. R. 10 Ex. 132; *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C., 4th Ser. 658.

(o) (1867), L. R. 2 C. P. 497.

(p) *Milvain v. Perez* (1861), 3 E. & E. 495. See also *Oglesby v. Yglesias* (1858), E. B. & E. 930.

(q) *Francesco v. Massey* (1873), L. R. 8 Ex. 101. See also *Kish v. Cory* (1875), L. R. 10 Q. B. 553 (C. A.).

notice of her arrival had been given to and received by charterer's agents in London, or lay-days to count. . . . Liability of C. to cease as soon as cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all demurrage." C. delayed orders at the port of call, and ordered the ship to a port which was not good and safe. *Held*, that C. was exonerated by the cesser clause, the term "lay-days to count" giving the owner some protection by his lien on the cargo (r).

Case 4.—A ship was chartered to load in the customary manner, proceed to Z., and then deliver, "the cargo to be discharged in ten working days. Demurrage at £2 per 100 tons register per diem. The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The ship was delayed in loading. *Held*, that demurrage in the clause giving the lien only applied to demurrage at the port of discharge, and that the charterer was therefore liable for damages for detention at the port of loading (s).

Case 5.—A ship was chartered to load a full and complete cargo . . . "this charter being concluded by C. for and on account of another party, it is agreed that all liability of C. shall cease as soon as the cargo is shipped, loading excepted, the owner agreeing to rest solely on his lien on the cargo for freight, demurrage, and all other claims." *Held*, that the charterers were liable for delay in loading (t).

Case 6.—A ship was chartered by C. "to load and unload with all dispatch . . . C.'s liability to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for freight and demurrage." *Held*, that demurrage applied to delay at the port of loading, that the owner had therefore a lien for it, and that the charterer was not liable (u).

Note.—Lord Bramwell piquantly described this class of cases as "cases where no principle of law is involved, but

(r) *French v. Gerber* (C. A.) (1877), 2 C. P. D. 247.

(s) *Lockhart v. Falk* (1875), L. R. 10 Ex. 132; *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C., 4th Ser. 658: see *Clink v. Radford*, (1891) 1 Q. B. 625; *Dunlop v. Balfour*, (1892) 1 Q. B. 507.

(t) *Lister v. Van Haansbergen* (1876), 1 Q. B. D. 269. This case turns on express evidence of intention in the words "loading excepted." So also *Pederson v. Lotinga* (1857), 28 L. T. 267, may be supported as turning on a clause to pay demurrage at the port of loading, day by day, and is so construed by Blackburn, J., in *Christoffersen v. Hansen* (1872), L. R. 7 Q. B. at p. 514. In *Rederiaktieselskabet Superior v. Dewar*, (1909), 2 K. B. 998, demurrage was "to be paid day by day as falling due," but there was no cesser clause, and *Pederson v. Lotinga* was held to be inapplicable.

(u) *Bannister v. Breslauer* (1867), L. R. 2 C. P. 497. This case has been much doubted, but never formally overruled.

only the meaning of careless and slovenly documents" (x). There is, however, an important conflict of principles of construction. The earlier cases seem to have proceeded on the view that the *cesser clause* only freed the charterer from his liability for breaches occurring after the shipment of the cargo, unless an intention to free him from liability for previous breaches was clearly shewn: *Milvain v. Perez* (y). Later and more authoritative construction has, in all cases where a lien has been given to the shipowner, freed the charterer from liability for breaches before or after shipment of cargo, to the extent of the lien, unless an intention to render him liable was clearly shewn: acting on the principle that the charterer's exemption should be co-extensive with the shipowner's lien (z). But, if this is to be consistently applied to the claims for or in the nature of demurrage, either (1) *there must be a lien for damages for detention in loading, under the name of "demurrage"*; for if there is not, and the charterer is freed from liability for all breaches before the shipment of cargo, he is freed from liability for damages for detention in loading while the shipowner has no corresponding lien on the cargo, to indemnify him; or (2) *the charterer must in spite of the cesser clause still be liable for damages for detention at the port of loading*; for, if he is not, the shipowner, having no lien for such damages, is also precluded by the cesser clause from his remedy against the charterer, and thus has a wrong without a remedy.

The only case in which a lien for "demurrage" has been held to cover damages for detention is *Bannister v. Breslauer* (a), in which there was no provision at all in the charter for demurrage in the strict sense, though a lien for "demurrage" was given, and this is the only ground on which this case is sustainable (b). It is clearly settled that in charters where there is a provision for demurrage at the port of discharge, but none at the port of loading, the charterer will not be freed by the cesser clause from liability for damages for detention at the port of loading (c), and the only case waiting judicial decision is where there is a partial provision for demurrage at the port of loading, as "ten days on demurrage at £10 per diem," which does not

(x) L. R. 6 Q. B. at p. 549.

(y) (1861), 3 E. & E. 495.

(z) See *Clink v. Radford*, (1891) 1 Q. B. 625; *Dunlop v. Balfour*, (1892) 1 Q. B. 507; *Hansen v. Harrold*, (1894) 1 Q. B. 612.

(a) (1867), L. R. 2 C. P. 497; see *post*, p. 181.

(b) *Per Bowen, L.J.*, in *Clink v. Radford*, (1891) 1 Q. B. at p. 631.

(c) *Clink v. Radford (v.s.)*; *Dunlop v. Balfour*, (1892) 1 Q. B. 507.

cover the whole delay. In this case the charterer will certainly be freed from his liability for demurrage in the strict sense, but his liability for damages for detention beyond the agreed days remains doubtful.

The difficulty was recognised by Brett, J., and Amphlett, B., in *Kish v. Cory* (d); but the decision of the point was not necessary to the case, and Amphlett, B., therefore declined to express any opinion, while Brett, J., and Coleridge, C.J., held the view, that the first alternative, a lien for damages for detention, under the name of "demurrage," or, in wider terms, a lien to the shipowner for whatever claims the charterer is exempted from, would be adopted when the case arose. Cleasby, B., suggested the second alternative.

In *Gray v. Carr* (1871) (e) four judges in the Exchequer Chamber expressly held that the clause, "the owners to have an absolute lien for demurrage on the cargo," did not give the owners a lien for damages for detention at the port of loading, as distinguished from demurrage there; and Brett, J., who, with Willes, J., dissented on another point, said nothing to qualify this, but put forward, as his own view, that the cesser clause only freed the charterer from liabilities arising after loading. In that case a ship was chartered to load at X. in "fifty running days for loading, to be discharged as fast as ship can put cargo out, and ten days on demurrage at £8 per day. The owners to have an absolute lien on the cargo for . . . demurrage . . . charterer's liability to cease on shipment of the cargo." Cargo was shipped under bills of lading to be delivered as per charter to G., "he paying freight, and all other conditions, or demurrage, if any should be incurred for the goods, as per charter." The vessel was detained ten days on demurrage in loading at X., and eighteen days beyond. At the port of discharge the master claimed against the consignees a lien for demurrage for ten days and for damages for detention for eighteen days. It thus became essential to determine what lien the master had by charter, before ascertaining how much of the charter the bill of lading incorporated. And four judges (f) expressly held that the shipowner under such a charter had a lien for demurrage, but not for damages for detention. In *Francesco v. Massey* (g) the Court below had held the charterer liable for damages

(d) (1875), L. R. 10 Q. B. 553.

(e) L. R. 6 Q. B. 522. See Note following Article 161, p. 433.

(f) *Gray v. Carr* (1871), L. R. 6 Q. B., per Cleasby, B., at pp. 527, 528. Channell, B., p. 544. Bramwell, B., p. 551. Kelly, C.B., p. 556.

(g) (1873), L. R. 8 Ex. 101 (C. A.).

for detention, and, though he appealed successfully against another part of their judgment, he did not appeal on this point, on which the Court had followed *Gray v. Carr*. And in *Lockhart v. Falk* (h), *Clink v. Radford* (i), and *Dunlop v. Balfour* (k) the Court expressly held that demurrage in the clause giving the lien must be confined to demurrage in the strictest sense of the term.

The suggested lien is open to the further objection that it is a lien for unliquidated damages, the objections to which in shipping cases have been pointed out most forcibly by Brett, J., himself in *Gray v. Carr* (l).

On the other hand, in favour of the first alternative are the remarks of Coleridge, C.J., and Brett, J., in *Kish v. Cory* (m); the dicta of Mellish, L.J., and Brett, L.J., in *Sanguinetti v. Pacific Steam Navigation Co.* (n), and the cases of *Bannister v. Breslau* (o), and *Restitution Co. v. Pirie* (p). But in two of these cases the remarks of the learned judges on this point were not necessary for the decision; the third case has been much questioned (q), and the last case must, it is submitted, be taken as overruled.

Notwithstanding these dicta and decisions, it is hard to see how the Courts, in face of *Gray v. Carr* (r), can fail to hold, where there is a demurrage clause in the charter, that the lien for demurrage does not include a lien for damages for detention. It must, however, be remembered, as a further point of complication, that the majority of the judges in *Gray v. Carr* held that a lien for "dead freight" would not cover a claim for unliquidated damages. But on this point their view is in conflict with *McLean v. Fleming* (s), and must now be taken to be erroneous (t).

(h) (1875), L. R. 10 Ex. 132, 136. Followed in *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C. 658.

(i) (1891) 1 Q. B. 625.

(k) (1892) 1 Q. B. 507.

(l) *Vide supra*, at p. 535. See also *Clink v. Radford*, at pp. 629, 631, 633, and *Dunlop v. Balfour*, at pp. 516, 519. And see *Phillips v. Rodig* (1814), 15 East, 547, and Note following Article 161, p. 433.

(m) (1875), L. R. 10 Q. B. (C. A.) 553.

(n) (1877), 2 Q. B. D. (C. A.) 238.

(o) (1867), L. R. 2 C. P. 497.

(p) (1899), 61 L. T. 330; affirmed, 6 Times L. R. 50.

(q) Brett, M.R., following his own remarks in *Sanguinetti v. Pacific Steam Co.*, gave a similar wide interpretation to "demurrage" in *Harris v. Jacobs* (1885), 15 Q. B. D. 247. The Scotch Courts have refused to follow these dicta of Lord Esher. See *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C., 4th Ser. 658.

(r) (1871), L. R. 6 Q. B. 522. The Scotch Courts have so held in *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C., 4th Ser. 658.

(s) (1871), L. R. 2 H. L. 128.

(t) See Note to Article 161, *infra*, p. 433.

The first alternative being thus disposed of, the second is that the charterer should still be liable for detention in loading, in spite of the "cesser clause." Assuming that there is no lien for damages for detention, the adoption of this alternative would carry out the principle that the charterer's exemption should be co-extensive with the shipowner's lien, at the expense of the strict interpretation of the clause. The alternative has been adopted in *Lockhart v. Falk* (u), *Clink v. Radford* (x), and *Dunlop v. Balfour* (y), where the charterer was held liable for damages for detention at the port of loading; it was also acted on in *Francesco v. Massey* (z), where the charterer did not dispute his liability for such damages for detention, and to some extent, in *Christoffersen v. Hansen* (a), where, in the absence of a lien for demurrage, the charterer was held liable for demurrage at the port of loading in spite of the cesser clause.

As the result, it seems that the principle to follow is, that the charterer's exemption should be co-extensive with the shipowner's lien, and that, as the existence of a lien is governed by principles of law, or by express agreement, the lien should be the chief factor in the couple. That therefore where there is no lien, as in the case of unliquidated damages in the absence of express agreement, there should be no exemption for the charterer. This is opposed to the view that the charterer should be held freed by the cesser clause, from all claims, and that therefore the shipowner's lien should be made co-extensive with his exemption.

The adoption of this principle involves disapproval of the *obiter dicta* in *Kish v. Cory* (b), and in *Sanguinetti v. Pacific Steam Navigation Co.* (c), and perhaps of the decision in *Restitution Co. v. Pirie* (d), and a careful restriction of the application of *Bannister v. Breslauer* (e), which, in view of the direct authorities on the point which we have cited, does not seem without justification (f).

(u) (1875), L. R. 10 Ex. 132.

(x) (1891) 1 Q. B. 625.

(y) (1892) 1 Q. B. 507.

(z) (1873), L. R. 8 Ex. 101.

(a) (1872), L. R. 7 Q. B. 509.

(b) (1875), L. R. 10 Q. B. 553.

(c) (1877), 2 Q. B. D. 238.

(d) (1889), 61 L. T. 330; on appeal, 6 Times L. R. 50.

(e) (1867), L. R. 2 C. P. 497.

(f) For discussion of the question by the Scotch Courts, see *Beynon v. Kenneth* (1881), 8 Sc. Sess. Cases, 4th Ser. p. 594; *Lamb v. Kaselack* (1882), 9 Sc. Sess. Cases, 4th Ser. p. 482; *Salvesen v. Guy* (1885), 13 Sc. Sess. Cases, 4th Ser. p. 85, and *Gardiner v. Macfarlane* (1889), 16 Sc. Sess. Cases, 4th Ser. p. 658, in which the Scotch Courts refused to follow Lord Esher's *dicta* referred to above.

SECTION V.

THE BILL OF LADING AS A DOCUMENT OF TITLE.

Article 55.—Signature of the Bill of Lading.

AFTER the shipment of goods under a contract of affreightment, the bill of lading (*a*), which, where there is no charter, constitutes the most important evidence of the contract of affreightment, is signed by the carrier or his agent (*b*), and delivered to the shipper. Such signing does not give rise to any new contract, but only gives precision to one which has been previously made.

The signature and delivery of the bill of lading create a document, subsequent dealings with which may have effects on the property in the goods shipped.

Note.—The practice of issuing a “set” of three bills of lading is very ancient (*c*). “Of the Bills of Lading there is commonly Three Bills of one tenor. One of them is enclosed in the letters written by the same Ship; another Bill is sent overland to the Factor or Party to whom the goods are consigned; the third remaineth with the Merchant, for his testimony against the Master, if there were any occasion or loose dealing” (*d*). It is an extraordinary proof of the general honesty of business that *Barber v. Meyerstein* (*e*)

(*a*) The shipper has usually obtained the printed form of the bill of lading used by the shipowner, and has filled in the details before presenting it; it is checked by the shipowner or his broker and then signed: *cf.* Note 2, p. 10.

(*b*) Usually in London for steamers, the loading broker, or the person doing his work; for sailing ships, usually the master; abroad, either the branch house, or agent of the line, or the master. Difficulties experienced by a goods-owner suing a shipowner in proving the agency of the person signing the bill of lading may frequently be avoided by suing in tort.

(*c*) *Cf.* the example, dated 1539, in Marsden, *Select Pleas in the Admiralty Court* (Selden Society, 1892), Vol. I., at p. 89.

(*d*) Malynes, *Lex Mercatoria* (1686), p. 97.

(*e*) (1870), L. R. 4 H. L. 317.

and *Glyn, Mills v. E. & W. I. Docks* (f) should be almost the only reported cases involving the sort of fraud that the existence of more than one bill of lading would seem to render so easy (g).

Article 56.—Indorsement of Bill of Lading.

Goods shipped under a bill of lading may be made deliverable to a named person, G., or to a name left blank, or “to bearer,” and in the first two cases may or may not be made deliverable to “order or assigns.”

Bills of lading making goods deliverable “to order,” or “to order or assigns,” are by mercantile custom negotiable (h) instruments, the indorsement and delivery of which may affect the property in the goods shipped (i).

Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an “indorsement in blank,” or by his writing “Deliver to I. [or order], F.,” which is called an “indorsement in full” (i).

So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be redelivered without any indorsement to the original holder, so as to affect the property in the goods (j).

But the holder of the bill may at any time fill in the blank either in the bill or indorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading (i).

(f) (1882) 7 A. C. 591.

(g) See also p. 328, as to the master's duty to deliver to the holder of only one bill of a set.

(h) See Note 1 below.

(i) Custom of merchants, as found in the special verdict in *Lickbarrow v. Mason* (1794), 5 T. R. 683; discussed by Lords Selborne and Blackburn, in *Sewell v. Burdick* (1884), 10 App. C. 74; and in Blackburn on Sale, 3rd ed. pp. 343-347.

(j) *Per* Lord Selborne in *Sewell v. Burdick*, 10 App. C. at p. 83. The inference that an assignment of property is contemplated will be weaker from an endorsement in blank than from one in full.

Semble.—A bill of lading which does not contain some such words as “to order,” or “to order or assigns,” or which is indorsed in full, but without such words (*k*), is not a negotiable instrument (*l*).

Note 1.—“Negotiable” is a term which perhaps strictly should be reserved for instruments which may give to a transferee a better title than that possessed by the transferor. A bill of lading is not “negotiable” in this sense: the indorsee does not get a better title than his assignor (*m*). A bill of lading is “negotiable” to the same extent as a cheque marked “not negotiable,” *i.e.*, it is “transferable.” The special verdict in *Lickbarrow v. Mason* (*n*) uses the words “negotiable and transferable.”

Note 2.—Where goods are to be carried under a through bill of lading, separate bills of lading are sometimes signed for the conveyance of goods on subsequent stages of the transit. In these bills of lading the company, or the ship-owner signing the through bill of lading, appears as the shipper, and there is indorsed on the bills, “Delivery to be made to the holders of the original bill of lading duly indorsed, per s.s. *S.*, from *X.*, dated . . .” This is done to prevent conflicting claims to the goods from two sets of bills of lading for the same goods being in circulation. There is also very commonly a reference in a through bill of lading and incorporation of the terms of the regular bills of lading in use by the steamship company carrying the goods. As to this, see p. 82, *supra*. In this case no bill of lading for the sea carriage is issued or signed; the regular form is merely referred to.

(*k*) *I.e.*, “deliver to A.”

(*l*) *Henderson v. Comptoir d'Escompte de Paris* (1873), L. R. 5 P. C. 253, at p. 260.

(*m*) *Cf.* Lord Campbell, *Gurney v. Behrend* (1854), 3 E. & B. at pp. 633, 634. One case in which the indorsee gets more than the indorser has (whether it can be called “a better title” is a nice question) is in the case where a previous vendor's right of stoppage *in transitu*, valid against the indorser, is not available against the indorsee. Hence the phrase of that most learned judge, Sir James Shaw Willes, that negotiable instruments “include bills of lading as against stoppage *in transitu* only” (*Fuentes v. Montts* (1868), L. R. 3 C. P. at p. 276). The indorsee of the bill of lading may get more favourable contractual rights than were possessed by the indorser, as in *Leduc v. Ward* (1888), 20 Q. B. D. 475. And thirdly, the assignor who has a defeasible title (*e.g.*, one liable to be put aside on the ground of his fraud) may validly pass the property to an assignee, as in *Pease v. Gloahec* (1866), L. R. 1 P. C. 219.

(*n*) See note (*i*), p. 184, *ante*.

Article 57.—Effects of Indorsement.

The indorsement and delivery of a bill of lading by the person entitled to hold it have effects depending partly on custom and partly on statute.

I.—*By mercantile custom* (*o*) such an indorsement and delivery of a bill of lading, made after shipment of the goods and before complete delivery of their possession has been made to the person having a right under the bill of lading to claim them (*p*), transfers such property (*q*) as it was the intention of the parties to the indorsement to transfer (*r*).

II.—*By the Bills of Lading Act* (*s*), the indorsee of a bill of lading, to whom under the particular circumstances of the indorsement the property in the goods shipped under the bill of lading passes, has all the rights and duties of the original shipper under the contract evidenced in the bill of lading (*t*).

(*o*) As stated in the special verdict in *Lickbarrow v. Mason* (1794), 5 T. R. 683. See note (*i*), p. 184, *ante*.

(*p*) *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317. Wrongful delivery of the goods, apart from the bill of lading, does not render the bill ineffective as a symbol of property; and its indorsement, even after such wrongful delivery, may still pass the property: *Short v. Simpson* (1866), L. R. 1 C. P. 248.

(*q*) Strictly speaking, the property is transferred, not by the indorsement, but by the contract under which the indorsement is made: see *per* Lord Bramwell, 10 App. C. at p. 105.

(*r*) *Sewell v. Burdick* (1884), 10 App. C. 74, and see Article 58.

(*s*) (1855), 18 & 19 Vict. c. 111, *vide post*, Appendix III.

(*t*) *Sewell v. Burdick*, *vide supra*, and see Article 75. The indorsee does not obtain any rights and duties of the original shipper, which are not derived from the contract evidenced in the bill of lading: *Leduc v. Ward* (1888), 20 Q. B. D. 475. Where the property does not pass by the indorsement, as in the case where the goods were before shipment the property of the indorsee, and the shipper and indorser his agent, the indorsee does not acquire by the indorsement any right to sue on the contract evidenced by the bill of lading (*Delaurier v. Wyllie* (1889), 17 Sc. Sess. C., 4th Ser. 167, as to the iron). Contrast the decision in the same case as to the coals, the property in which did pass to the indorsee by the indorsement. *Semble*, that, as to the iron, the owner might be undisclosed principal on the bill of lading.

*Article 58.—Effects on Property of Indorsement by
Mercantile Custom.*

The presumed intention of the parties in indorsing a bill of lading may vary widely according to the circumstances.

It may be an intention :—

1. To transfer absolutely the property in the goods (*u*), subject only, if the price be unpaid, to the right of the unpaid vendor (*x*) to stop the goods in their transit to the vendee, as a means of reasserting his lien on the goods for the price unpaid, known as the right of Stoppage *in transitu* (*y*).

2. To pass the property on certain conditions, as on the acceptance of bills of exchange for the price (*z*).

3. To effect a mortgage of the goods as security for an advance (*a*).

4. To effect a pledge of the goods for the same purpose (*b*).

5. To pass no property at all in the goods (*c*).

Note.—The decision in *Sewell v. Burdick* (*d*) has made it clear that the effect of the indorsement of a bill of lading depends entirely on the particular circumstances of each indorsement, and that there is no general rule that indorsement passes the whole legal property in the goods, as had been strongly contended by Brett, M.R., (*e*), in the Court below, and in *Glyn, Mills & Co. v. East and West India Docks* (*f*). In the light of this decision, the special verdict in *Lickbarrow v. Mason* (*g*), which recites that “the property is transferred by indorsement,” must be read “the property which it was the intention to transfer is transferred” (*h*); and many *obiter dicta* on the subject, such as the statement of Lord Hatherley in *Barber v. Meyer-*

(*u*) See Article 59.

(*y*) See Articles 63-71.

(*a*) See Article 72.

(*c*) See Article 74.

(*e*) 13 Q. B. D. at p. 167.

(*f*) (1880), 6 Q. B. D. at p. 480.

(*g*) (1794), 5 T. R. 683.

(*h*) As suggested by Lord Selborne, 10 App. C. at p. 80.

(*x*) See Article 60.

(*z*) See Articles 61, 62.

(*b*) See Article 73.

(*d*) (1884), 10 App. C. 74.

stein (i), that, when goods are at sea, assigning the bill of lading is parting with the "whole and complete ownership of the goods," and of Lord Westbury in the same case (i), that the transfer of the bill of lading for value "passes the absolute property in the goods," must be taken as overruled, or strictly limited to the circumstances of the particular case (k).

Article 59.—Intention to transfer the whole Property by Indorsement of the Bill of Lading.

Property in goods at sea may be completely passed by indorsement and delivery of the bill of lading under which they are shipped, in exchange for payment of the price.

Note 1.—The question of property in goods shipped is not of great importance to the shipowner, as he is safe in delivering to the holder of the first bill of lading duly presented, if he has no notice or knowledge of other claims (l), while if he has such knowledge, though probably in strict law he must either deliver at his peril to the rightful claimant, or interplead (m), yet in practice he can almost always obtain in exchange for delivery of the goods an indemnity against legal proceedings, which will render him virtually safe. For this reason we have not gone minutely into the numerous cases on this subject. An exhaustive discussion of them will be found in Benjamin on Sale, 6th ed., pp. 386-450, and a summary of the results at p. 448. Part of this summary has been approved by the House of Lords (n), and a similar summary is to be found in the judgment of Cotton, L.J., in *Mirabita v. Ottoman Bank* (o).

Note 2.—The property in goods shipped under a bill of lading may be passed without indorsement of such bill (p),

(i) (1870), L. R. 4 H. L. 325, 335.

(k) See 10 App. C. at pp. 81, 104.

(l) *Glyn, Mills v. West India Dock Co.* (1882) 7 App. C. 591; see Article 125.

(m) *Per* Lord Blackburn, 7 App. C. at p. 611.

(n) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116, at p. 127.

(o) (1878), 3 Ex. D. at p. 172.

(p) *Meyer v. Sharpe* (1813), 5 Taunt. 74; *Nathan v. Giles* (1814), 5 Taunt. 558. The ordinary operation of the law as to the sale of goods which transfers the property in them is not affected by the existence of a bill of lading relating to those goods, by the indorsement

and it would seem that subsequent indorsement of the bill of lading to a different person will have no effect in passing the property, unless the circumstances of the case warrant the application of the Factors Act. Whether a subsequent indorsement to a person who has already by a contract of sale acquired property in the goods will give that person contractual rights under the bill of lading seems doubtful. *Delaurier v. Wyllie* (q) decides that indorsement of a bill of lading covering goods that were before shipment the property of the indorsee, the shipper and indorser being his agent, does not give the indorsee any rights in the contract evidenced by the bill of lading differing from the actual contract under which the goods were shipped. This, however, does not cover such a case as the following:—Goods the property of A. shipped by him on Jan. 1 under a bill of lading to his order; on Jan. 10 A. sells the goods afloat to B., under such terms that the property in them passes immediately to B.; on Jan. 30 A. indorses the bill of lading to B. It seems doubtful on the strict wording of the Bills of Lading Act ("to whom the property . . . shall pass upon or by reason of . . . such indorsement") whether B., acquires contractual rights against the shipowner under the bill of lading: though apparently, if on Jan. 31 B. indorsed the bill to C. in pursuance of a contract of sale c.i.f., C. would acquire such rights.

Note 3 (r).—In a contract for the sale of goods upon "c.i.f." terms, the contract, unless otherwise expressed, is for the sale of goods to be carried by sea (s), and the seller performs his part by shipping goods of the contractual description (t) on board a ship bound to the contractual destination (u), or purchasing afloat goods so

of which, as one of the methods recognised by that law, the property may be passed. (Cf. *Parke, B., Bryans v. Nix* (1839), 4 M. & W. 775, at pp. 790, 791.) And, in truth, "property does not pass by indorsement of the bill of lading, but by the contract in pursuance of which the indorsement is made." *Per Lord Bramwell, Sewell v. Burdick* (1884), 10 A. C. at p. 105.

(q) (1889), 17 Sc. Sess. C. 167.

(r) *McCardie, J.*, refers to this Note with approval in *Manbré Co. v. Corn Products Co.*, (1919) 1 K. B. 198, at p. 202.

(s) *In re L. Sutro & Co. and Heilbut Symons & Co.*, (1917) 2 K. B. 348.

(t) *Harland & Wolff v. Burstall*, (1901) 6 Com. Cas. 113.

(u) *Lecky v. Ogilvie* (1897), 3 Com. Cas. 29 (the two Tripolis). The seller must pay any expenses necessary to secure delivery at the contractual destination, e.g., lighterage to a wharf at the port of discharge in addition to the ocean freight when that wharf is the destination named in the c.i.f. contract: *Acme Wood Co. v. Sutherland* (1904),

shipped (*v*), and tendering, within a reasonable time after shipment (*x*), to the purchaser the shipping documents, the goods during the voyage being at the risk of the purchaser (*y*). In such a contract of sale of "unascertained goods" (*z*) the property probably passes to the purchaser only when the bill of lading is indorsed to and accepted by him (*a*). It has been held by a very eminent legal arbitrator, under such a contract, that there was an "unconditional appropriation" by the seller (under Rule 5 (1) of sect. 18 of the Sale of Goods Act, 1893) by the transmission of a detailed descriptive invoice to the purchaser some time before tender of the bill of lading and its acceptance by him without demur, and that upon the subsequent receipt of the bill of lading the purchaser could not reject the goods as not being of the contractual description. If this be correct such a set of circumstances seems to give a commercial probability to the hypothetical case discussed in Note 2 above, viz. would any rights under the bill of lading pass by its indorsement to the indorsee, who already owned the goods?

"Shipping documents" in such a contract of sale means a bill or bills of lading (*b*) and a policy of insur-

9 Com. Cas. 170. But of course the buyer, as indorsee of the bill of lading, must pay any demurrage the shipowner can claim under it, and cannot seek to recover this back from the seller.

(*v*) The decision on service out of the jurisdiction of the House of Lords in *Johnson v. Taylor*, (1920) A. C. 144, now rendered obsolete, by the amendment of R. S. C., Order 11, r. 1 (e), seems to overlook this possibility. A seller who has not shipped goods may yet perform his *c.i.f.* contract of sale.

(*x*) *Groom v. Barber*, (1915) 1 K. B. 316. If the first tender is bad the seller can make a second tender which may be good, if he can do so within the time required by the contract for performance: *Borrowman v. Free* (1878), 4 Q. B. D. 500.

(*y*) *Tregelles v. Sewell* (1862), 7 H. & N. 574; *Groom v. Barber*, *ubi supra*.

(*z*) Sale of Goods Act, 1893, ss. 16-18.

(*a*) *Wait v. Baker* (1848), 2 Exch. 1; *The Miramichi*, (1915) P. at p. 78. Cf. Kennedy, J., *Ryan v. Ridley* (1902), 8 Com. Cas. at p. 107. If the bill of lading is indorsed to the buyer and posted to him, probably the property would pass on its being put into the post. Cf. *Badische Anilin v. Basle Co.*, (1898) A. C. at pp. 203, 204. There are, however, *dicta* to the effect that the property may pass upon shipment of the goods. See *Ireland v. Livingston* (1872), L. R. 5 H. L. at p. 409; *Biddell v. E. Clemens Horst Co.*, (1911) 1 K. B. at p. 956. Cf. *Groom v. Barber*, (1915) 1 K. B. at p. 324. Though the property passes payment may by the terms of the contract be postponed: *Dupont v. British S. Afr. Co.* (1901), 18 Times L. R. 24.

(*b*) The bill or bills of lading must cover the whole transit of the goods from the port of shipment to the port of arrival: *Hansson v. Hamel* (1922), 2 A. C. 36, following *Landauer v. Crazen*, (1912) 2 K. B. 94, and explaining *Cox v. Malcolm*, (1912) 2 K. B. 107, note.

ance (c) reasonably covering the value of the goods, though not necessarily their whole value at the destination (d). An actual policy must be tendered, and an insurance broker's cover-note or certificate that he has effected insurance is not sufficient (e). The policy to be tendered must be "upon the terms current in the trade" (f) as regards such points as the perils insured against and the quantum (e.g. as to f.p.a. franchise) covered. A similar test (g) applies to

The bill of lading must be for the contractual quantity and not for a quantity in excess of that: *In re Keighley, Marted and Bryan & Co.* (No. 2) (1894), 70 L. T. 155. A bill of lading must be tendered and a delivery order to the ship, or ship's release, will not suffice (*Heilbut, Symons & Co. v. Harvey* (1922), 12 Ll. L. R. 455) unless, as is common, the contract expressly so provides.

(c) He must tender a policy even if the goods have arrived in safety: *Orient Co. v. Brekke*, (1913) 1 K. B. 531. If the contract requires "an approved policy," that means a policy "to which no reasonable mercantile objection can be taken." Cf. *Hodgson v. Davies* (1810), 2 Camp. at p. 532, and *Smith v. Mercer* (1867), L. R. 3 Ex. at p. 54. as to "approved bill."

(d) *Tamvaco v. Lucas* (1861), 1 B. & S. 185. See also *Burstall v. Grimsdale* (1906), 11 Com. Cas. 280, and *Strass v. Spillers*, (1911) 2 K. B. 759. As to insurance against "all risks," see *Yuill v. Scott Rotson*, (1908) 1 K. B. 270, and *Vincentelli v. Rowlett* (1911), 16 Com. Cas. 310. As to liability of vendor if policies turn out to be invalid or worthless, see *Cantiere Meccanico v. Constant* (1912), 17 Com. Cas. 182, 188, 192. *Semble*, the seller would be similarly liable if the bill of lading he tendered was a forgery: with which position contrast that in *Leather v. Simpson* (1871), L. R. 11 Eq. 398; *Guaranty Trust v. Hannay*, (1918) 2 K. B. 623.

(e) *Wilson Holgate v. Belgian Grain Co.*, (1920) 2 K. B. 1. In practice such documents are constantly accepted pending actual preparation of the policies. Some forms of c.i.f. contract expressly provide that they shall suffice. A certificate of insurance, containing all the terms of the insurance, issued by an insurance company under a floating policy, upon which document the company can be sued, would suffice in any case. McCardie, J., has held that a certificate is not a policy and cannot be tendered (*Diamond Co. v. Bourgeois* (1921), 3 K. B. 443). Sankey, J., held that a certificate in lieu of a policy is a good tender: *Scott v. Barclay's Bank* (1922), 12 Ll. L. R. 502. We suggest that if the document tendered, though called a certificate, contains all the terms of insurance, and upon it *by itself* the company can be sued, it is immaterial that it is called a certificate and not a policy, or that it purports to be issued pursuant to some policy previously in existence. But on appeal from Sankey, J., in the case above cited ((1923), 39 T. L. R. 198), the C. A. held that if it merely conveys to a holder a right to sue under an existing policy, which is not in the buyer's possession or control, and does not in itself contain all the terms of the insurance, the buyer is not given an effective insurance "document" or "approved policy" and can refuse it.

(f) *Per Hamilton, J.*, *Biddell v. E. Clemens Horst Co.*, (1911) 1 K. B. at p. 220.

(g) Cf. *Burstall v. Grimsdale* (1906), 11 Com. Cas. 280. If the seller has to pay advance freight on shipment, he should presumably insure

any question as to the propriety of the bill of lading tendered (*h*), *e.g.* as to the nature of the vessel (*i*), its route (*k*), or the terms of carriage.

The best way of approaching the consideration of all questions on c.i.f. sales is to realise that this form of the sale of goods is one to be performed by the delivery of documents representing the goods (*l*), *i.e.* of documents giving the right to have the goods delivered or the possible right, if they are lost or damaged, of recovering their value from the ship-owner or from underwriters (*m*). The seller performs his contract by tendering the documents and breaks it by failing to tender them. In order to be in a position to perform by so tendering it may be necessary for him to ship the goods, though not invariably, since he may buy documents for goods already afloat. In holding that the seller breaks his contract by failing to ship the goods (*n*) did the House of Lords sufficiently distinguish between performance of the contract and the doing of something which is, or may be, a necessary step towards ability to perform the contract?

From the fact that the contract is performed by the delivery of documents it results that various rules in the

the advance freight by a separate policy which he keeps himself, and intimate to the buyer that on the arrival of the ship the amount of the advance freight should be paid to the seller in place of payment of freight to the shipowner.

(*h*) In *Diamond Co. v. Bourgeois*, (1921) 3 K. B. 443, McCardie, J., held, apparently as a matter of law, that a bill of lading in the form "Received for shipment on board the —" was not a good tender under any c.i.f. contract. The decision seems open to question, and the C. A. appears to have held that a bill of lading in this form was a good tender: *Weis v. Produce Brokers Co.* (1921), 7 Ll. L. R. 211, in which case there was evidence that the form was "quite usual in the trade, not universal but quite usual" (Bankes, L.J., *ibid.*, at p. 212).

(*i*) *E.g.* whether it must be a steamer or may be a sailing vessel: *Ranson v. Manufacture D'Engrais* (1922), 13 Ll. L. R. 205.

(*k*) *Shipton v. Weston* (1922), 10 Ll. L. R. 762.

(*l*) The difference between Scrutton, J., in *Karberg v. Blythe*, (1915) 2 K. B. at p. 388, and Bankes, L.J., and Warrington, L.J., S. C., (1916) 1 K. B. 495, is one of language rather than of substance. *Cf.* *Manbré Co. v. Corn Products Co.*, (1919) 1 K. B. at p. 203.

(*m*) In some trades there is in use a form which is in terms expressed to be a c.i.f. contract, but also in terms provides (i) for payment on landed weights; (ii) for payment as to any goods arriving damaged with an allowance for the damage; and (iii) for the contract to be void as to any portion shipped but not arriving. The buyer here seems to have no insurable interest in any policy, and no likelihood of any claim for damages upon the bill of lading, and except for being called a c.i.f. contract it does not really seem to be one at all.

(*n*) *Johnson v. Taylor*, (1920) A. C. 144. See now Order 11, r. 1 (*e*).

Sale of Goods Act, 1893, which is primarily drafted in relation to the sale and delivery of goods on land, can only be applied to c.i.f. sales *mutatis mutandis* (o). And there may be cases in which the buyer must pay the full price for delivery of the documents, though he can get nothing out of them, and though in any intelligible sense no property in the goods can ever pass to him, *i.e.* if the goods have been lost by a peril excepted by the bill of lading, and by a peril not insured by the policy, the bill of lading and the policy yet being in the proper commercial form called for by the contract (p).

Under a c.i.f. contract, "payment against shipping documents," the price is due upon, or within a reasonable time after, tender of the documents (q), irrespective of the arrival of the ship (r), and notwithstanding that the buyer has had no opportunity of inspecting the goods to ascertain whether they are in accordance with the contract (s).

Article 60.—Unpaid Vendor's Securities.

Where goods are shipped by a vendor, in pursuance of his buyer's order, for delivery to the buyer, such shipment *prima facie* passes the property to the buyer,

(o) *Cf. E. Clemens Horst Co. v. Biddell*, (1912) A. C. 18. So in sect. 51 of the Act "the time when the goods ought to have been delivered" means, in regard to failure to deliver under a c.i.f. contract, the time when in the normal course the shipping documents ought to have been tendered, not the time when the goods would themselves have arrived: *Sharpe v. Nosawa*, (1917) 2 K. B. 814. See also *Produce Brokers Co. v. Weis & Co.* (1918), 87 L. J. K. B. 472.

(p) *Groom v. Barber*, (1915) 1 K. B. 316; *Weis v. Credit Co.*, (1916) 1 K. B. 346; see also *Law v. Brit. Am. Tobacco Co.*, (1916) 2 K. B. 605; and *Clark v. Cox, McEuen & Co.* (1920), 25 Com. Cas. 94.

(q) If the buyer refuses to accept the documents, the seller's claim against him is for damages for breach of contract, not for the price: *Stein v. County Co.* (1916), 115 L. T. 215.

(r) *Ryan v. Ridley* (1902), 8 Com. Cas. 105. See also *Polenghi v. Dried Milk Co.* (1904), 10 Com. Cas. 42. Where, as is common, the contract provides for payment "on arrival of the vessel," and the vessel is lost and so never arrives, payment, in the absence of anything to indicate the contrary, must be made at the time when she ought to have arrived. In short, "on arrival of the vessel" specifies the time when, and not a condition upon which, payment is to be made. *Cf. Fragano v. Long* (1825), 4 B. & C. 219.

(s) *E. Clemens Horst v. Biddell*, (1912) A. C. 18.

delivery to the ship being equivalent to delivery to him (t).

But under these circumstances the unpaid vendor has the right to stop the goods *in transitu* (u), though they are made by the bill of lading deliverable to the vendee (x).

An unpaid vendor frequently insists on more than this security for the price, and deals with the bill of lading so as to prevent the property in the goods from passing to the vendee on their shipment, either by:—

(I.) Reserving to himself the *jus disponendi* (y).

(II.) Conditional indorsement of the bill of lading (z).

Article 61.—Reservation of Jus Disponendi by Unpaid Vendor.

The unpaid vendor may take from the master a bill of lading making the goods deliverable to his order or to his agent, and may forward this bill to his agent, with instructions not to indorse it to the vendee except on payment for the goods.

If he takes the bill in this form on his own behalf, and not as agent for, or on behalf of, the purchaser, he thereby reserves to himself the power of absolutely disposing of the goods, known as the *jus disponendi*, and no property will pass to the purchaser by the shipment (a). Payment or tender of the price will pass the property to the purchaser (b), unless this *jus disponendi* has been

(t) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116, at p. 127; and see Article 68.

(u) *Vide post*, Article 63.

(x) *Ex parte Banner* (1876), 2 Ch. D. 278, at p. 288.

(y) See Article 61.

(z) See Article 62; and also Sale of Goods Act, 1893, s. 19.

(a) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; *Mirabita v. Ottoman Bank* (1878), 3 Ex. D. at p. 172; *Ogg v. Shuter* (1875), 1 C. P. D. 47; *Gabarron v. Kreeft* (1875), L. R. 10 Ex. 274: see Sale of Goods Act, 1893, s. 19, sub-ss. 1, 2.

(b) *Mirabita v. Ottoman Bank*, *vide supra*.

reserved by the vendor for some other purpose than that of securing the contract price (c).

Note.—It has been discussed whether the *jus disponendi* is merely a vendor's lien, or is some right in the vendor concomitant with property in the vendee, or whether it operates as an act of the vendor which prevents the property from passing to the vendee on shipment of the goods, and postpones the vesting of the property till certain conditions are satisfied. *Ogg v. Shuter* (d) shews that it is more than a vendor's lien. The judgment in *Mirabita v. Ottoman Bank* (e) declines to decide between the last two alternatives, but the language of Cotton, L.J., in the same case appears to shew that to speak of the vendor's *jus disponendi* is another way of saying that the property has not passed to the vendee, whatever may be his rights under the contract of sale. In the Prize Court, where in many cases it has been necessary to decide precisely when the property in goods sold has passed, it has uniformly been held that the reservation of the *jus disponendi* by the seller does prevent the property passing to the buyer (f).

Article 62.—Conditional Indorsement by Unpaid Vendor.

The unpaid vendor may draw a bill of exchange on the vendee for the price, and either:—

(I.) Forward it for acceptance, together with a copy of the bill of lading (g), sending also an indorsed bill of lading to his agent (h); or:—

(II.) Discount it at a bank, depositing an indorsed bill of lading as security for the advance, and leaving the bank to present the bill of exchange for acceptance, together with the bill of lading (i).

(c) *Wait v. Baker* (1848), 2 Ex. 1.

(d) (1875), 1 C. P. D. 47.

(e) (1878), 3 Ex. D. 164.

(f) Cf. e.g., *The Miramichi*, (1915) P. 71, at p. 78.

(g) In *Coventry v. Gladstone* (1867), L. R. 4 Eq. 493, an attempt to set up a custom to deliver bills of lading, not when bills of exchange were accepted, but when they were paid, failed.

(h) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116.

(i) *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543. Where a bank presents a bill of exchange with bills of lading annexed, it is

In case (I.) the vendee cannot retain the bill of lading, or obtain the indorsed bill of lading unless he accepts the bill of exchange (*k*). But if being in possession of the indorsed bill of lading he transfers it by indorsement to an innocent holder for value, that holder obtains under the Factors Act, 1889, a good title to the goods, though the vendee has not accepted the bill of exchange (*l*).

In case (II.) he cannot obtain the bill of lading from the bank unless he satisfies the bank's claim for advances (*m*); but if, before the bank realises the goods to satisfy its claim, the vendee tenders the amount claimed, the property in the goods will at once pass to him (*n*), and he will be entitled to the bill of lading, unless the *jus disponendi* has been reserved by the vendor with some other intention than that of securing the contract price (*o*).

The vendee is not entitled to require delivery of all copies of the bill of lading before accepting bills of exchange, if the copy tendered is in fact effectual to pass the property; nor, *semble*, can he claim that they should be delivered at such a time that they can be forwarded to arrive at the port of destination before the ship, but only that the shipper shall forward them with all reasonable dispatch (*p*).

In all these cases the vendor, by reserving the *jus disponendi*, is *primâ facie* presumed to intend to retain

not taken to guarantee that the latter are genuine: *Leather v. Simpson* (1871), L. R. 11 Eq. 398; *Barter v. Chapman* (1874), 29 L. T. 642; *Guarantee Co. v. Hannay* (C. A.), (1918) 2 K. B. 623.

(*k*) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116. See also Sale of Goods Act, 1893, s. 19, sub-s. 3, and *Cahn v. Pockett's S.S. Co.*, (1899) 1 Q. B. 643. For special facts under which the consignee who had received bills of lading was held not bound to accept bills of exchange drawn against them, see *Depperman v. Hubbersty* (1852), 17 Q. B. 766; for special facts in which the consignee was held to be bound, see *Imperial Ottoman Bank v. Cowan* (1874), 31 L. T. 336; *Hoare v. Dresser* (1859), 7 H. L. C. 290.

(*l*) *Cahn v. Pockett's S.S. Co.*, (1899) 1 Q. B. 643.

(*m*) *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543.

(*n*) *Mirabita v. Ottoman Bank* (1878), 3 Ex. D. 164.

(*o*) *Wait v. Baker* (1848), 2 Ex. 1. See also *Barber v. Taylor* (1839), 5 M. & W. 527; *Gilbert v. Guignon* (1872), L. R. 8 Ch. 16.

(*p*) *Sanders v. Maclean* (1883), 11 Q. B. D. 327.

the property in the goods (*g*), and the burden of disproving this intention lies on those who dispute it (*r*).

Case 1.—P. requested V. in Brazil to purchase cotton for him. V. did so and forwarded it to England, taking a bill of lading deliverable to V.'s order, and describing the cotton in the invoice as "shipped on account and at the risk of P." V. forwarded to his agent W. the invoice and two bills of lading; W. sent on to P. the invoice and one bill of lading, indorsed, and a bill of exchange for the price of the cotton. P. refused to accept the bill of exchange, but kept the bill of lading, which he handed to his brokers, who paid the freight on the cotton, and got a delivery order from the shipowners. Meanwhile, W. obtained delivery of the cotton under the second bill of lading. *Held*, that W.'s action reserved to him the *jus disponendi*, and the property in the cotton: that P. could not keep the bill of lading without accepting the bill of exchange, and that W. was justified in taking possession of the cotton (*s*).

Case 2.—V. purchased goods in X., as agents for P. in England, with the proceeds of bills drawn by V. on P., and discounted in X. On shipping, V. took bills of lading making the goods deliverable to P. and forwarded them to P. by post, with notice of the bills of exchange drawn. While the goods were *in transitu* P. became bankrupt, having accepted some of the bills, but having paid none. *Held*, that the property had passed absolutely to P., subject only to V.'s right to stop *in transitu* (*t*).

Case 3.—V. shipped guano to P., as the result of a correspondence, which objected to the proposed price, but asked the captain

(*g*) The property and possession in goods shipped has been held to be transferred to the vendee on the facts of the following cases:—*Walley v. Montgomery* (1803), 3 East, 585; *Coxe v. Harden* (1803), 4 East, 211; *Ogle v. Atkinson* (1814), 5 Taunt. 759; *Wilmshurst v. Bowker* (1844), 7 M. & G. 882; *Key v. Cotesworth* (1852), 7 Ex. 595; *Joyce v. Swann* (1864), 17 C. B. N. S. 84; *Castle v. Playford* (1872), L. R. 7 Ex. 98; *Ex parte Banner* (1876), 2 Ch. D. 278; *Mirabita v. Ottoman Bank* (1878), 3 Ex. D. 164; *Colonial Ins. Co. v. Adelaide Ins. Co.* (1886), 12 App. C. 128.

The property or possession was held to have been reserved by the vendor and shipper in the following cases:—*Craven v. Ryder* (1816), 5 Taunt. 433; *Ruck v. Hatfield* (1822), 5 B. & Ald. 632; *Brandt v. Bowlby* (1831), 2 B. & Ad. 932; *Ellershaw v. Magniac* (1843), 6 Ex. 570; *Wait v. Baker* (1848), 2 Ex. 1; *Van Casteel v. Booker* (1848), 2 Ex. 691; *Jenkyns v. Brown* (1849), 14 Q. B. 496; *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543; *Moakes v. Nicolson* (1865), 19 C. B. N. S. 290; *Falke v. Fletcher* (1865), 18 C. B. N. S. 403; *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; *Ogg v. Shuter* (1875), 1 C. P. D. 47; *Gabarron v. Kreeft* (1875), L. R. 10 Ex. 274.

(*r*) *Joyce v. Swann* (1864), 17 C. B. N. S. 84.

(*s*) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116. See also *Barrow v. Coles* (1811), 3 Camp. 92, and *Cahn v. Pockett's S.S. Co.*, (1899) 1 Q. B. 643.

(*t*) *Ex parte Banner* (1876), 2 Ch. D. 278.

to bring some other goods as well. P. insured the cargo. V. took a bill of lading, making the goods deliverable to V., or order, but before it was indorsed to P. the ship was wrecked. The jury found that V. had intended the shipment to pass the property to P., and had not intended to keep the guano in his own hands; and this verdict was sustained by the Court, who *held* that the property was in P. from the time of shipment (u).

Case 4.—V. sold potatoes to P., payment to be by cash against bill of lading, and took a bill of lading, deliverable to V. or order. The ship arrived on January 26. W., the agent of V., presented on January 27 the bill of lading to P., who refused to accept the bill of exchange annexed, on the plea of short shipment. There was in fact no short shipment; and on February 2, W. sold the potatoes: P. on the same day giving notice that he claimed them, but not tendering the price. *Held*, that until P. paid or tendered cash against the bill of lading, the possession (*quære* property) was in W., with a power to sell the goods (x).

Case 5.—V. purchased cotton by P.'s orders and shipped it on P.'s ship, V. taking a bill of lading, making the cotton deliverable at Z., "to order or assigns, paying for freight for the cotton nothing, being owner's property." V. indorsed the bill in full:—"Deliver to the bank of Z., or order"; drew bills of exchange on P., and discounted them at another bank on the security of an indorsed bill of lading. V. also forwarded to P. an invoice stating that the goods were shipped "by order and for account of P. and to him consigned." P. became bankrupt before the goods arrived; V. paid the bills of exchange, and claimed to stop the goods *in transitu*; the representatives of P. claimed the goods on arrival. *Held*, that by the terms of the bill of lading, V. reserved to himself the *jus disponendi* in the goods, and did not lose it by indorsing the bill to the bank; and that he consequently was entitled to the goods as against P.'s representatives (y).

Case 6.—V. shipped 600 tons umber upon a ship chartered for P., under a bill of lading, deliverable to V. or assigns. P. insured the umber. V. drew a bill of exchange for the price and forwarded it for discount to the Z. bank, with the bill of lading. P. declined to accept the bill, but afterwards, and before the bank dealt with the cargo, tendered the amount of the bill of exchange, and demanded the bill of lading. The bank refused, and sold the umber. *Held*, that the refusal and sale were wrongful, and that the property passed to P. on his tender made before the bank had realised (z).

Case 7.—V. agreed to sell to P. corn for cash or acceptance on handing over bill of lading. V. sent P. the charter of the ship made in V.'s name, in which the corn was loaded, and took a bill of lading, deliverable to G. or assigns. When the cargo reached

(u) *Joyce v. Swann* (1864), 17 C. B. N. S. 84.

(x) *Ogg v. Shuter* (1875), 1 C. P. D. 47.

(y) *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543.

(z) *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164.

its destination, V. left the invoice and an unindorsed bill of lading with P., who raised disputes as to the quality of the cargo, but afterwards tendered the price. V. refused to accept it. *Held*, that no property in the corn passed to P., either at shipment, or by the tender of the price (a).

Case 8.—V. agreed to sell to P. iron, payment in cash at L., in exchange for bills of lading. V. took a set of three bills of lading, forwarded two duly endorsed to his agents in L., and retained the third himself. On August 3, V.'s agents tendered the two bills to P., who refused to pay cash unless all three were tendered. V.'s agents accordingly procured the third, and tendered the three to P. on August 9. P. refused to pay cash on the ground that the tender was so late, that he could not forward them so as to reach the port of destination before the ship. *Held*, (1), that the tender of what was in fact a bill effectual to pass the property was good, though the purchaser, in the absence of the other bills of the set, did not know it was effectual (b). (2) *Seemle* (c), that so long as V. used reasonable diligence in tendering the bill of lading to P., it was not necessary that he should tender it in time for it to reach the port of destination before the carrying ship (d).

Article 63.—*Stoppage in transitu.*

Under certain conditions a vendor, who has forwarded goods in such a manner that the property, though not the actual possession, has passed to the purchaser (e), has

(a) *Wait v. Baker* (1848), 2 Ex. 1, distinguished in *Mirabita v. Ottoman Bank* (1878), 3 Ex. D. 164, as a case where the vendor kept a hold on the cargo for the purpose of securing his absolute property in the corn till he chose to pass it to the purchaser, and not merely to secure the contract price. Such a distinction has rather a slender foundation in fact, and it is submitted that the authority of *Wait v. Baker* is much weakened by the more recent decision. See also *Ellershaw v. Magniac* (1843), 6 Ex. 570; *Gatarron v. Kreeft* (1875), L. R. 10 Ex. 274.

(b) Thus if the third bill had been indorsed to I., before the tender of the other two to P., the tender would not be effective, but P. was not entitled to require proof of the effectiveness of the tender, a state of things productive of some hardship.

(c) *Per Brett, M.R.*, at pp. 336—338: *Cotton, L.J.*, at p. 340, and *Bowen, L.J.*, at p. 344, express themselves not unfavourably to this view, but decline finally to decide it.

(d) *Sanders v. Maclean* (1883) (C.A.), 11 Q. B. D. 327.

(e) It is beyond the scope of this work to discuss exhaustively the cases when property passes on shipment; the method of reserving property in the vendor by taking bills of lading, making the goods deliverable to his order, has been dealt with above: Article 61. On the question of appropriation of goods not specific, the reader is referred to *Benjamin on Sale*, Book II., c. 5, and the numerous cases cited in the various stages of *Inglis v. Stock* (1885), 10 App. C. 263.

the right of resuming possession of the goods during their transit to the purchaser.

This resumption of possession by the vendor does not amount to rescission of the contract (*f*), but is the exercise by an unpaid vendor (*g*) of his right to insist on his lien for the price (*h*).

This right, known as the right of Stoppage *in transitu* (*i*), may be exercised:—

(i) by an unpaid vendor of goods and others in an analogous position; (*Article* 64):

(ii) on the bankruptcy or insolvency of the vendee; (*Article* 65):

(iii) as against such vendee, and all persons claiming under him; (*Article* 66):

(iv) except as against an indorsee and/or transferee of the bill of lading or other document of title for such goods (*k*), who has given valuable consideration for such indorsement and/or transfer, in ignorance of any circumstances which would prevent such indorsement or transfer from acting as a valid transfer of a property or interest in the goods; (*Article* 67):

(v) at any time before the vendee has acquired possession of the goods by himself or his agent, and so terminated the transit (*l*); (*Articles* 68, 69).

(*f*) *Kemp v. Falk* (1882), 7 App. C. at p. 581; *In re Humberston* (1846), De Gex, 262; *Wentworth v. Outhwaite* (1842), 10 M. & W. 436.

(*g*) It depends on the character of unpaid vendor, and not on the nature of a lien; for other persons who are entitled to liens have yet no right to stop *in transitu* after they have lost possession: *Kinloch v. Craig* (1790), 3 T. R. 788.

(*h*) Statement of law by Cotton, L.J., in *Phelps v. Comber* (1885), 29 Ch. D. at p. 821. The right is not affected by the Bills of Sale Acts: *Ex parte Watson* (1877), 5 Ch. D. 35, at p. 44.

(*i*) The history of the right is to be found in Lord Abinger's judgment in *Gibson v. Carruthers* (1841), 8 M. & W. 337. It first appears in Chancery in 1690 (*Wiseman v. Vandeputt*, 2 Vern. 202), and is introduced into the Courts of Law by Lord Mansfield in 1757 (*Burghall v. Howard*, 1 H. Bl. 366, *n.*). See also *Booth v. Cargo Fleet Co.*, (1916) 2 K. B. at pp. 579, 580, and 597, 598; Benjamin on Sale, 6th ed. p. 1003; Blackburn on Sale, 3rd ed. pp. 339-348. The law is now codified in the Sale of Goods Act, 1893, ss. 44-48; see Appendix III.

(*k*) See Factors Act, 1889 (51 & 52 Vict. c. 45), s. 10, Appendix III.; and *Note*, p. 206.

(*l*) *Lickbarrow v. Mason* (1794), 1 Smith, L. C. 12th ed. p. 726.

Article 64.—Who may exercise the Right of Stoppage.

A. An unpaid vendor from whom the property in the goods has passed.

The fact that he has received part of the price will not divest his right (*m*) unless the contract is apportionable, in which case the price also can be apportioned, and part of the goods, being paid for, will be exempt from stoppage (*n*). Neither will the fact that payment has been received in bills of exchange, not yet matured, divest his right (*o*), unless such bills were taken as absolute payment, and not as payment conditional on their being met at maturity, and the burden of proving this rests on those who assert it (*p*).

That there is an unadjusted account current between vendor and vendee will not divest the right (*q*); but if there is an ascertained balance against the vendor, it seems that the right is lost (*r*).

B. Persons in a position analogous to that of an unpaid vendor:—

1. A commission agent purchasing goods on orders from his principal is treated for this purpose (*s*) as a vendor, and may stop *in transitu* (*t*).

(*m*) *Hodgson v. Loy* (1797), 7 T. R. 440; *Feise v. Wray* (1802), 3 East, 93.

(*n*) *Merchant Banking Co. v. Phoenix Bessemer Co.* (1877), 5 Ch. D. 205.

(*o*) *Feise v. Wray*, *vide supra*; *Edwards v. Brewer* (1837), 2 M. & W. 375; *Gunn v. Bolckow Vaughan* (1875), L. R. 10 Ch. at p. 501, *per Mellish*, L.J. *Davis v. Reynolds* (1815), 1 Stark. 115, must be taken as overruled.

(*p*) Benjamin on Sale, 6th ed. p. 1008, and cases there cited.

(*q*) *Wood v. Jones* (1825), 7 D. & R. 126.

(*r*) *Vertue v. Jewell* (1814), 4 Camp. 31. This case is perhaps open to some of the criticisms of Benjamin (6th ed. p. 1010), though the remarks founded on *Patten v. Thompson* (1816), 5 M. & S. 350, seem erroneous, as that case did not involve the definition of an unpaid vendor, but the question whether a particular indorsement of the bill of lading by the vendee was sufficient to divest the right of stoppage *in transitu*. See also Benjamin, 6th ed. p. 1063.

(*s*) Though for other purposes as an agent: *Cassaboglou v. Gibb* (1863), 11 Q. B. D. 797.

(*t*) *Feise v. Wray* (1802), 3 East, 93; *Ireland v. Livingston* (1872), L. R. 5 H. L. at p. 409, *per* Lord Blackburn; *Ex parte Banner* (1876), 2 Ch. D. at p. 287.

2. A principal consigning goods to a factor (*u*).
3. The agent of the vendor, to whom a bill of lading has been indorsed, may stop in his own name (*x*), while, without such indorsement, he may stop, if so instructed, in the vendor's name (*y*).
4. The unpaid vendor of an interest in an executory agreement (*z*).
5. A surety for the buyer who has paid the vendor (*a*).
6. A person who has at the time no authority to stop, provided that the vendor ratifies his action before the transit is ended (*b*).
7. Partner against partner (*c*).

Article 65.—Insolvency of Vendee.

Insolvency is the inability to pay just debts in the ordinary course of trade and business (*d*).

It may be evidenced by stoppage of payment, or even by failure to pay one debt. It will be sufficient if the vendee is insolvent when the transit ends, though he was not insolvent when the notice to stop *in transitu* was given (*e*).

Quære, whether if the vendee fail to meet the bills of

(*u*) *Kinloch v. Craig* (1790), 3 T. R. 783; *Newsom v. Thornton* (1805), 6 East, 17.

(*x*) *Morison v. Gray* (1824), 2 Bing. 260.

(*y*) *Whitehead v. Anderson* (1842), 9 M. & W. 518.

(*z*) *Jenkyns v. Usborne* (1844), 7 M. & G. 678.

(*a*) Under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5. See also *Imperial Bank v. London and St. Katherine Docks* (1877), 5 Ch. D. 195.

(*b*) *Bird v. Brown* (1850), 4 Ex. 786; *Hutchings v. Nunes* (1863), 1 Moore, P. C. N. S. 243. He must purport to act on behalf of the vendor: *Keighley, Maxted & Co. v. Durant*, (1901) A. C. 240.

(*c*) *Ex parte Cooper* (1879), 11 Ch. D. 68.

(*d*) *Per Willes, J., Reg. v. Sadler's Co.* (1863), 10 H. L. C. at p. 425. Cf. Sale of Goods Act, 1893, s. 62 (3). In *National Bank v. Morris*, (1892) A. C. 287, the Privy Council held that a creditor knew his debtor was insolvent if he had knowledge of circumstances from which ordinary men of business would conclude that the debtor was unable to meet his liabilities. See also (as to refusal to pay on outbreak of war) *The Feliciano* (1915), 59 S. J. 546.

(*e*) *The Constantia* (1807), 6 C. Rob. at pp. 326, 327; *Vertue v. Jewell* (1814), 4 Camp. 31; *Dixon v. Yates* (1835), 5 B. & Ad. 313.

exchange drawn against the cargo, which fall due after the termination of the transit, but has not up to the end of the transit committed any open act of insolvency, a stoppage *in transitu* by the vendor would be effective (f).

Article 66.—Against whom the Right may be exercised.

The right of stoppage *in transitu* exists against the vendee, and all persons claiming under him (with the exception stated in Article 67) (g). Thus it avails against a sub-purchaser from the vendee, whose title is not founded on indorsement and delivery of the bill of lading, or of some other document of title, for value, even though he has paid the purchase-money to the vendee. For such a sub-sale would only pass to the sub-vendee such equitable interest as his immediate purchaser could convey and not the legal property in the goods, and would not prejudice the unpaid vendor's right of stoppage *in transitu*, which is a right against the goods (h).

Where, however, a sub-sale has taken place without indorsement and delivery of a document of title, but the sub-vendee has not paid the purchase-money, the Court in working out the equitable rights of the parties may

(f) Probably not, on the authorities, though it is submitted that on principle the question would be whether the vendee was in fact insolvent on the day of the negotiation of the bill of lading, or the end of the transit. In favour of this latter view, see Sir W. Scott, in *The Constantia* (1807), 6 C. Rob. at pp. 326, 327, and Dr. Lushington, in *The Tigress* (1863), B. & L. 38, at p. 44. On the other side, see Lord Blackburn, in *Kemp v. Falk* (1882), 7 App. C. at p. 581, and in *Blackburn on Sale*, 3rd ed. pp. 412, 413; and Mellish, L.J., in *Gunn v. Bolckow Vaughan* (1875), L. R. 10 Ch. at p. 501. It seems hard that an indorsee of a bill of lading from a vendee, who knew that his indorser, though he had not committed any open act of insolvency, was in fact unable to pay his debts, should be held to have acquired any title against the unpaid vendor, though some of the above *dicta* suggest that he would acquire such a title.

(g) Sale of Goods Act, 1893, s. 47.

(h) *Kemp v. Falk* (1882), 7 App. C. 573. Being such a right, the unpaid vendor has no rights against the money receivable under a policy of insurance for damage to goods *in transitu*: *Berndtson v. Strang* (1865), L. R. 3 Ch. 588.

direct the sub-purchaser to pay the purchase-money to the original vendor as a condition of receiving the goods (*i*).

But if the legal property in the goods has passed out of the vendee, either by an effective indorsement and delivery of a document of title, or by his obtaining and giving actual possession, the vendor will then have no rights against the purchase-money unpaid by the sub-vendee (*i*).

The unpaid vendor's lien will not override the lien of the carrier for his charges on the special goods carried (*k*), but will be preferred to claims on the goods put forward through the vendee alone (*l*); *e.g.* to a carrier's claim of lien for a general balance due from the owner or consignee of the goods (*m*); or to any attachment of the goods obtained by a creditor of the vendee (*n*).

Case 1.—V. sold goods to P., so that the property passed to P., and they were shipped, consigned to G. P. indorsed the bills of lading to a bank, as security for an advance; G. sold the goods "to arrive" to K. P. then became bankrupt, and V. gave notice to the master to stop the goods *in transitu*. K. paid the purchase-money to G., but it had not reached P. The goods were delivered to K. by the master on the production of receipts for the price signed by G. G. paid the purchase-money to the bank, who, after satisfying their own claims (*o*), paid the balance to P.'s assignees. *Held*, that as the transactions with K., not being accompanied by the transfer of any document of title, had only passed such equitable interest as P. could convey, and not the legal property in the goods, V.'s right of stoppage *in transitu* still existed against the goods, and that, therefore, V., and not P.'s assignees, was entitled to the balance of the purchase-money paid by K., after satisfying the bank, V. being in strictness

(*i*) *Kemp v. Falk* (1882), 7 App. C. 573, *per* Lord Selborne, at pp. 577, 578; Lord Blackburn, p. 582. See, however, Lord Fitzgerald's reservation, p. 590; *Ex parte Golding, Davis & Co.* (1880), 13 Ch. D. 628.

(*k*) *Oppenheim v. Russell* (1802), 3 B. & P. 42; *Richardson v. Goss* (1802), 3 B. & P. 119. See also *Crawshay v. Eades* (1823), 2 D. & R. 288; *Mercantile Bank v. Gladstone* (1868), L. R. 3 Ex. 233.

(*l*) *I.e.*, such claims as arise not from the carriage of the goods, but from the fact that the vendee is their owner.

(*m*) *Oppenheim v. Russell* (1802), 3 B. & P. 42; *United States Co. v. G. W. R. Co.*, (1916) 1 A. C. 189.

(*n*) *Smith v. Goss* (1808), 1 Camp. 282.

(*o*) On the authority of *In re Westzinthus* (1833), 5 B. & Ad. 817, *et post*, Article 67.

entitled to detain the goods themselves against K., after satisfying the bank (p).

Case 2.—V. sold goods to P., to be shipped *f. o. b.* at X. P. resold them to G., and took a bill of lading, making the goods deliverable to G., but did not forward the bill to G. While the goods were on board ship at X., P. stopped payment. V. served notice on the master, stopping the goods *in transitu*. G. had not then paid the sub-purchase-money to P. Held, that V. was entitled to be paid his purchase-money out of the sums owing to P. by G. (q).

Article 67.—Effect of Indorsement and Delivery of a Document of Title on the Right of Stoppage.

Such an indorsement of the bill of lading, *bonâ fide* (r) and for valuable consideration, as absolutely passes the property in the goods (s), completely defeats the vendor's right of stoppage *in transitu* (t).

Such an indorsement as acts as a mortgage or pledge

(p) *Kemp v. Falk* (1882), 7 App. C. 573.

(q) *Ex parte Golding, Davis & Co.* (1880), 13 Ch. D. 628. It is submitted, that this case must be thus limited if it is to stand with the decision in *Kemp v. Falk*, *vide supra*, and the *dicta* therein of Lords Selborne and Blackburn. But James and Cotton, L.JJ., in this case, and the Court of Appeal in *Ex parte Falk* (1880), 14 Ch. D. 446, express themselves in a manner which covers a much wider proposition; viz., that where the absolute property has passed by a sale by the vendee to a sub-purchaser, but the sub-purchase-money has not been paid, the vendor can stop the sub-purchase-money, though the property in the goods is not in the vendee. The *dicta* in *Kemp v. Falk* of Lord Blackburn (p. 582), and Lord Selborne (pp. 577, 578), clearly, though not expressly, negative this proposition. The Court of Appeal in *Ex parte Golding, Davis, Bramwell, L.J.*, saying, "the decision was a novelty," but it is submitted that the novelty was only in the *obiter dicta*, and that they cannot be sustained in face of the *dicta* of the Law Lords in *Kemp v. Falk*.

(r) On knowledge of insolvency, see *National Bank v. Morris*, (1892) A. C. 287.

(s) See *Sewell v. Burdick* (1884), 10 App. C. 74, and Articles 57, 58, 72, 73. For cases where no property passed by the indorsement and the unpaid vendor's right was not defeated, see *Patten v. Thompson* (1816), 5 M. & S. 350, on which see the Factors Act of 1842 (5 & 6 Vict. c. 39); *The Tigress* (1863), B. & L. 38.

(t) Sale of Goods Act, 1893, s. 47; *Lickbarrow v. Mason* (1794), 1 Smith, L. C., 12th ed. p. 726; *Pease v. Gloahac* (1866), L. R. 1 P. C. 219; *Kemp v. Canavan* (1863), Irish Rep. 15 C. L. 216, in which the effect of the Bills of Lading Act on *Lickbarrow v. Mason* was considered.

of the goods (*u*), leaves to the vendor the right to stop all the property remaining in the vendee. This is a qualified right, because it cannot be exercised so as to affect the interests of such an indorsee of the bill of lading, without paying him off. The vendor can stop the goods on satisfying the claims of the mortgagee or pledgee: or is entitled to receive the proceeds of the goods after those claims have been satisfied by realisation of the goods. He can also in Equity compel the vendee's creditor to marshal the securities for his debt, so as, if possible, to protect his rights as unpaid vendor (*u*).

The valuable consideration for which the indorsement is made may be past (such as a loan already made, or an existing debt) or present (*x*). The transaction must also be *bonâ fide*, or without knowledge of facts that would make the bill of lading not fairly and honestly assignable, such as an open act of insolvency of the consignee or vendee (*y*), or equities affecting the goods (*z*). That the indorsee knows that the goods have not been paid for is not sufficient to prevent the indorsement from defeating the right to stop (*a*).

Note.—We have not dealt with the difficult questions arising under the Sale of Goods Act, 1893, and the Factors Acts, because the most important of them appear not to concern the shipowner or charterer in any way. Section 47 of

(*u*) *Kemp v. Falk* (1882), 7 App. C. 573; *Spalding v. Ruding* (1843), 6 Beav. 376; 15 L. J. Ch. 374, on appeal; *In re Westzinthus* (1883), 5 B. & Ad. 817. See Articles 72, 73.

(*x*) *Leask v. Scott* (1877), 2 Q. B. D. 376 (C. A.), dissenting from *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393, which held that a past consideration was not sufficient. See also *Chartered Bank v. Henderson* (1874), L. R. 5 P. C. 501, where the consideration was forbearance to sue for an existing debt: *The Emilien Marie* (1875), 44 L. J. Adm. 9.

(*y*) *Vertue v. Jewell* (1814), 4 Camp. 31; *Cuming v. Brown* (1807), 9 East, 506; 1 Camp. 104; *Salomons v. Nissen* (1788), 2 T. R. 674, 681. And see Article 65, and note (*f*), p. 203.

(*z*) Such as it was attempted to prove in *Henderson v. Comptoir d'Escompte* (1873), L. R. 5 P. C. 253; *Chartered Bank v. Henderson*; *The Emilien Marie*, *vide supra*.

(*a*) *Cuming v. Brown*, *vide supra*. As to the effect of dealing with the goods, otherwise than by indorsement and transfer of the bill of lading, see *ante*, Article 59, Note 2; Article 66.

the former Act, and section 10 of the Factors Act, 1889 (52 & 53 Vict. c. 45), reproducing clause 5 of the Act of 1877 (40 & 41 Vict. c. 39), are specially difficult to construe. They provide that where any "document of title" to goods (as defined in section 1 of the Act of 1889, and section 62 of the Act of 1893, including therefore delivery orders and dock warrants) has been lawfully transferred to any person as a buyer or owner of such goods, and such person transfers such document to a person who takes the same *bonâ fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu*, as the transfer of a bill of lading has for defeating the right of stopping *in transitu*.

Apparently, therefore, where B., a vendee to whom the property in goods *in transitu* has passed, sells them to C., and gives him a delivery order, and C. in turn transfers such delivery order to D. for valuable consideration, the transfer from C. to D. will defeat the right of stoppage in A., the unpaid vendor.

But:—(1), apart from the Factors Acts, a delivery order unaccepted by the dock company or warehouseman has never been taken by the Courts of law as a document of title at all, but only as "the token of an authority to receive possession": *Farina v. Home* (b); *M'Ewan v. Smith* (c); *Griffiths v. Perry* (d); (2), though early in the nineteenth century mercantile juries seem to have considered delivery orders as documents of title (see Benjamin on Sales, 6th ed., pp. 977 *seq.*), it is believed that at the present day delivery orders are not treated by London merchants and bankers as "documents of title" at all; (3), before the Act of 1877, which is reproduced in the Act of 1889, the holder of a delivery order could either (a) present it, and obtain the goods, if there was no stop; (b) present it, and on its being recognised, leave the goods in the hands of the warehouseman as his bailee, constructive delivery thus taking place; (c) could in addition obtain a "warrant" from the warehouseman as a document of title to the goods; but, until he did one of these things, he acquired no title to the goods: see *Imperial Bank v. St. Katharine's Docks* (e); *Lackington v. Atherton* (f); and it was expressly laid down in *Barber v.*

(b) (1846), 16 M. & W. 119.

(c) (1849), 2 H. L. C. 309.

(d) (1859), 1 E. & E. 680.

(e) (1877), 5 Ch. D. 195.

(f) (1844), 7 M. & G. 360.

Meyerstein (g), that until one of these three courses had been taken, the bill of lading was the only symbol of the goods that could transfer any property in them, but when one of these courses was taken the power of the bill of lading was gone: see also *Coventry v. Gladstone (h)*. But the adoption of any one of these three courses would also terminate the transit, as the warehouseman would then hold as bailee for the vendee or assignee; consequently, apart from the Factors Acts, a delivery order could have no effect as a document of title until the transit was determined, and therefore dealings with it could have no effect on the vendor's right of stoppage *in transitu*.

Did, then, clause 5 of the Act of 1877 modify this? Taken literally, it certainly did, but it is difficult to believe that the legislature meant to interfere with the position of the bill of lading as the only symbol of the goods while in transit. For the above reasons, the question, which is a difficult one, is only suggested here (*i*).

Lord Blackburn, in *Kemp v. Falk (k)*, held that cash receipts, *i.e.*, receipts for the price of goods given by the vendee's agents, on production of which the carrier delivered the goods, were not documents of title within clause 5 of the Act of 1877, whose indorsement defeated the vendor's right to stop; and that if they were documents of title, the statute was "never meant to have that effect"; what effect is not very clear.

On the general question of delivery orders and warrants, see also *Merchant Banking Co. v. Phoenix Bessemer Co. (l)*, *Gunn v. Bolckow Vaughan (m)*; *Coventry v. Gladstone (n)*; *Pooley v. Great Eastern Railway (o)*. See also, as to provisions of the Indian Contract Act similar to section 47 of the Sale of Goods Act, *Ramdas v. Amerchand (p)*.

(g) (1870), L. R. 4 H. L. at p. 390.

(h) (1868), L. R. 6 Eq. 44.

(i) See for a discussion on similar questions and of the now numerous clauses in private Acts authorising the issue of negotiable warrants for goods, an article by Mr. A. T. Carter in L. Q. R., Vol. III. p. 300.

(k) (1882), 7 App. C. at pp. 585, 586.

(l) (1877), L. R. 5 Ch. D. 205.

(m) (1875), L. R. 10 Ch. 491.

(n) (1868), L. R. 6 Eq. 44.

(o) (1876), 34 L. T. 537.

(p) (1916), L. R. 43 Ind. App. 164, where a railway receipt was held to be a document of title.

Article 68.—*The Transit.*

The determination of the beginning or end of the transit during which the goods may be stopped, involving, as it does, questions whether property or possession was intended by the parties to pass, must depend on the intention of the parties as shown by all the facts of the case (*q*).

Thus wrongful or mistaken delivery will not either commence (*r*) or end (*s*) the transit, nor will wrongful refusal to deliver by the carrier prevent the transit being considered at an end (*t*).

The transit commences when the vendor has given up possession of the goods in fulfilment of the contract, and continues until the goods have reached the hands of the vendee, or of one who is his agent to take possession of and keep the goods for him at such a place that the goods will remain there until a fresh destination is communicated to them by order from the vendee (*u*).

The necessity for stoppage *in transitu* does not arise until the vendor loses possession, as till then his possession enables him to exercise directly his lien for the unpaid price.

(*q*) (1877), *per* Jessel, M.R., 5 Ch. D. 219.

(*r*) *Ruck v. Hatfield* (1822), 5 B. & Ald. 632, where goods were shipped conditionally on obtaining bills of lading reserving the *jus disponendi* to the consignor; see also the suggestion in *Schotsmans v. L. & Y. R. Co.* (1867), L. R. 2 Ch. 332, 335, that a vendor would not terminate the transit by shipping goods on a ship in ignorance of the ship's being owned by the vendee.

(*s*) *Litt v. Cowley* (1816), 7 Taunt. 169, where the carrier, after notice to stop, delivered by mistake to the consignee; see also *Loeschman v. Williams* (1815), 4 Camp. 181, a case of conditional delivery.

(*t*) Sale of Goods Act, 1893, s. 45, sub-s. 6; *Bird v. Brown* (1850), 4 Ex. 786; see also *Cowasjee v. Thompson* (1845), 5 Moore, P. C. 165, at p. 175, where vendors wrongfully retained a mate's receipt for the goods.

(*u*) Sale of Goods Act, 1893, s. 45; *per* Willes, J., in *Bolton v. L. & Y. R.* (1866), L. R. 1 C. P. at p. 439; Lord Ellenborough in *Dixon v. Baldwin* (1804), 5 East, 175; approved by C. A. in *Ex parte Miles* (1885), 15 Q. B. D. 39, at p. 44, and in *Bethell v. Clark* (1888), 20 Q. B. D. 615. These cases were approved by the Privy Council in *Lyons v. Hoffnung* (1890), 15 A. C. 391. See also *Kendal v. Marshall* (1883), 11 Q. B. D. 356, and Article 69.

In some cases the vendor, by giving up possession, may also end the transit, as where he delivers goods on board the vendee's ship (*x*), without reserving the *jus disponendi* to himself (*y*). It makes no difference whether the ship is a general ship, or sent specially for the goods (*z*), or whether she is owned by the vendee, or is under a charter to him amounting to a demise (*a*).

But delivery of the goods on board a ship chartered by the vendee, if the charter does not amount to a demise will not end the transit, unless it clearly appears that such is the intention of the parties (*b*). Such an intention will not be inferred from the fact that the delivery is *f. o. b.*, nor from the fact that the vendor does not know the ultimate destination of the vessel (*c*).

Case 1.—V. sold goods to P. and shipped them on board P.'s ship, then on the berth as a general ship. Bills of lading were taken, making the goods deliverable to P. or assigns. *Held*, that such shipment prevented V. from stopping *in transitu* (*d*).

Case 2.—V. sold clay to P. deliverable *f. o. b.* at X. It was shipped at X. on a ship chartered by P. V. did not know the ship's destination: no bills of lading were taken, nor did P. give an acceptance for the price. *Held*, that the clay was in the possession of the master of the ship as carrier, and that V. could therefore stop it during the voyage, on P.'s insolvency (*c*).

(*x*) Sale of Goods Act, 1893, s. 45, sub-s. 5; *Schotsmans v. L. & Y. R. Co.*, (1867), L. R. 2 Ch. 332; *Merchant Banking Co. v. Phoenix Bessemer Co.* (1877), 5 Ch. D. 205, at p. 219; *Van Casteel v. Booker* (1848), 2 Ex. 691.

(*y*) *Vide ante*, Article 61.

(*z*) *Schotsmans v. L. & Y. R. Co.*, *vide supra*, at pp. 336, 337, distinguishing *Mitchel v. Ede* (1840), 11 Ad. & E. 888.

(*a*) *Fowler v. M'Taggart* (1801), cited at 1 East, 522.

(*b*) Sale of Goods Act, 1893, s. 45, sub-s. 5; *Berndtson v. Strang* (1868), L. R. 4 Eq. 481; 3 Ch. 588; *Moakes v. Nicholson* (1865), 19 C. B. N. S. 290; *Bohtlingk v. Inglis* (1803), 3 East, 381; *Thompson v. Trail* (1826), 2 C. & P. 334. *Inglis v. Usherwood* (1801), 1 East, 515, as explained by the same Court in *Bohtlingk v. Inglis*, *vide supra*, at p. 398, is not contrary to the text. Cf. *Colonial Ins. Co. v. Adelaide Ins. Co.* (1886), 12 App. C. at p. 137.

(*c*) *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560; compare *Bethell v. Clark* (1888), 20 Q. B. D. 615.

(*d*) *Schotsmans v. L. & Y. R. Co.* (1867), L. R. 2 Ch. 332.

Article 69.—When the Transit ends.

The transit may be ended (e):—

I. By delivery to the vendee or his agents:

II. By delivery to a forwarding agent (f):

III. By mutual agreement between vendee and carrier whereby the carrier holds as agent for the vendee (f).

1. By actual delivery to the vendee or his agents (g), even before the original place of destination (h). What circumstances amount to delivery of the goods will depend on the intention of the parties concerned (i).

The delivery of part of the goods operates as a constructive delivery of the whole only in cases where the delivery takes place in the course of delivery of the whole, as where an essential part of a machine packed in parts is delivered to the consignee (k), in which case the taking possession of such a part by the buyer would be the acceptance of constructive possession of the whole (l).

(e) Sale of Goods Act, 1893, ss. 45, 46.

(f) These two classes are really special kinds of agents for the vendee.

(g) Willes, J., in *Bolton v. L. & Y. R. Co.* (1866), L. R. 1 C. P. at p. 439; such delivery may be at the vendee's own warehouse, or at a place which he uses as his own, for the deposit of goods, though belonging to another: *Scott v. Pettit* (1803), 3 B. & P. 469; *Rowe v. Pickford* (1817), 8 Taunt. 83; per Parke, B., in *James v. Griffin* (1837), 2 M. & W. at p. 633.

(h) Sale of Goods Act, 1893, s. 45, sub-s. 2; *L. & N. W. R. v. Bartlett* (1861), 7 H. & N. 400. The dictum of James, L.J., in *Ex parte Watson* (1877), 5 Ch. D. at p. 43, that, where the contract is to send goods to a place Z., "if the vendor found out that the goods were going to be diverted from the ship bound to Z. he would be entitled to obtain an injunction to prevent" such diversion, is not inconsistent with this, as delivery after notice to stop *in transitu* would not be effectual in any case, while delivery before notice to stop, though short of Z., would be effectual, in spite of any injunction. *Semble*, that if the vendee acquires possession against the carrier's will, such possession is not effectual to deprive the vendor of his rights. (See Blackburn on Sales, 3rd ed. p. 406; *Bird v. Brown* (1850), 4 Ex. 786, and cases, Article 68, and Note to section 3 of this article. *Contra*, per Parke, B., in *Whitehead v. Anderson* (1842), 9 M. & W. 518, at p. 534.)

(i) See cases on constructive delivery summarised in Benjamin on Sales, 6th ed., pp. 971, 1014.

(k) *Ex parte Cooper* (1879), 11 Ch. D. 68, per Cotton, L.J., at p. 75.

(l) Sale of Goods Act, 1893, s. 45, sub-s. 7; *Ex parte Cooper* (1879), 11 Ch. D. 68, approving Willes, J., at L. R. 1 C. P. 440. Cases where part delivery has been held to give constructive delivery of the whole, are *Tanner v. Scovell* (1845), 14 M. & W. 28; *Slubey v. Heyward* (1795),

The burden of proving such constructive delivery is on those who assert it (*m*).

Case.—V. shipped 100 tons of iron castings to P. on a ship chartered by V. under a bill of lading to P. and assigns. On arrival thirty tons had been delivered to P., who had paid part of the freight. V. then stopped *in transitu*. *Held*, the notice was good as to that part of the cargo not delivered (*m*).

2. Delivery of goods to a forwarding agent will or will not end the transit, according as the forwarding agent receives them as agent for the vendee or as carrier. The chief test of his character is whether he receives the instructions necessary for forwarding from the vendee or vendor (*n*). It is immaterial that the property in the goods passes to the vendee on delivery to the carrier (*o*).

Thus, if the vendor from the contract of sale or from instructions from the vendee, can give no further directions as to the destination of the goods, and they will therefore remain with the forwarding agent, unless and until he has received instructions from the vendee, such

2 H. Bl. 504; *Hammond v. Anderson* (1803), 1 B. & P. N. R. 69; *Jones v. Jones* (1841), 8 M. & W. 431, which were criticised in *Ex parte Cooper*, *vide supra*, at p. 77, and *Ex parte Falk* (1880), 14 Ch. D. at p. 455, and 7 App. C. 573, 579, 586. See also *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; *Whitehead v. Anderson* (1842), 9 M. & W. 518; *Dixon v. Yates* (1833), 5 B. & Ad. 313, 339.

(*m*) *Ex parte Cooper* (1879), 11 Ch. D. 68; one reason given by the Court, that constructive delivery would involve the master's abandonment of his lien for the balance of the freight, appears inconsistent with *Allan v. Gripper* (1832), 2 C. & J. 218, in which it was *held* that the existence of the carrier's lien was not inconsistent with his holding as the vendee's agent, though the transit was at an end.

(*n*) Sale of Goods Act, 1893, s. 45, sub-s. 3; *Kendal v. Marshall* (1883), 11 Q. B. D. 356. See also a note by Mr. A. Cohen, Q.C., in "Law Quarterly Review," Oct. 1885. The test may be put otherwise: "Is the transit prescribed by the vendor over? If so, the right to stop is gone, though further transit takes place prescribed by the vendee." But *Ex parte Rosevear China Co.* (1879), 11 Ch. D. 560 (Article 68, Case 2), shews that sometimes the vendor may be unable to "prescribe the transit," and yet retain his right to stop. It is easy to distinguish the facts of this case from others, but hard to see the principle of distinction between them. The test is also subject to this, that if the vendee gets the goods by consent of the carrier before the prescribed transit is over, the right is gone. See this point discussed by Bowen, L.J., in *Kendal v. Marshall*, *vide supra*, at p. 639.

(*o*) *Lyons v. Hoffnung* (1890), 15 App. C. 391.

an agent will receive the goods as agent for the vendee, and on his receiving them the transit will be at an end (*p*).

If, on the other hand, the vendor can and does give such instructions, either from the terms of the contract indicating further transit, or by instructions independent of the contract, the transit will not end on delivery to the forwarding agent, though the particular ship in which the transit is to be made is ordered by the vendee, for in this case the forwarding agent receives the goods as carrier (*q*).

“The question in very nearly all cases of stoppage *in transitu* is, speaking generally, one of fact” (*r*).

Case 1.—V. sold goods to P. in London, P. being employed as commission agent by G. in Jamaica. P. ordered the goods of V. “for the mark E. M., Kingston, Jamaica.” V. knew from previous dealings that this mark was used by G. P. instructed V. to pack the goods, mark them with the above mark, and forward them to Q. at Southampton for shipment by the S. V. forwarded to Q., adding “please forward as directed”: V. sent particulars of mark, &c., of goods, leaving columns for “consignee” and “destination” blank. After this P. wrote to Q. that the consignee was G., and the destination “Kingston, Jamaica.” The goods were shipped under bills of lading describing P. as consignor. P. afterwards failed. *Held*, that V.’s right to stop had ceased when the goods reached Q. (*s*).

Case 2.—V. sold goods to P. in London; P. wrote to V.: “Please consign the goods to the *Darling Downs*, to Melbourne,

(*p*) *Ex parte Miles* (1885), 15 Q. B. D. 39, affirming *Dixon v. Baldwin* (1804), 5 East, 175; *Rowe v. Pickford* (1817), 8 Taunt. 83; *Ex parte Gibbes* (1875), 1 Ch. D. 101; *Leeds v. Wright* (1803), 3 B. & P. 320.

(*q*) *Bethell v. Clark* (1888), 20 Q. B. D. 615; *Lyons v. Hoffnung*, *v. s.*; *Ex parte Watson* (1877), 5 Ch. D. 35, as explained in *Ex parte Miles* (1885), 15 Q. B. D. at pp. 46, 47; *Kendal v. Marshall* (1883), 11 Q. B. D. 356; *Rodger v. Comptoir d’Escompte* (1869), L. R. 2 P. C. 393; *Valpy v. Gibson* (1847), 4 C. B. 837; *Nicholls v. Le Feuvre* (1835), 2 Bing. N. C. 81; *Coates v. Ratton* (1827), 6 B. & C. 422 (doubted by Brett, L.J., 11 Q. B. D., at p. 366); *Smith v. Goss* (1808), 1 Camp. 282; *James v. Griffin* (1837), 2 M. & W., per Parke, B., at p. 633. See also *Kemp v. Ismay Imrie* (1909), 14 Com. Cas. 202.

(*r*) *Per Vaughan Williams, J., In re Gurney* (1892), 67 L. T. 598. In that case the fact that the vendor directed the goods to be delivered at the docks “for shipment by the M.,” and the goods to be marked “Trinidad,” was held not to prolong the transit beyond the docks. Upon facts not very dissimilar a different conclusion was arrived at in *Kemp v. Ismay Imrie & Co. (ubi supra)*. Cf. *Reddall v. Union Castle Co.* (1914), 20 Com. Cas. 86.

(*s*) *Ex parte Miles* (1885), 15 Q. B. D. 39.

loading in the East India Docks here." V. sent the goods by rail to London. The railway company sent P. an advice note that the goods were at his order and risk, together with a note: "The goods advised by this note have been forwarded to our Poplar Station for shipment per *Darling Downs*." They were so forwarded by the railway company and were shipped on the *Darling Downs*, for Melbourne, the mate's receipts being sent to P. On the day they were shipped P. failed, and V. sent notice to the railway company to stop delivery, too late to prevent shipment. *Held*, that the captain of the ship received the goods as a carrier to Melbourne; that the transit did not therefore end till M., and that the notice to stop was effectual (t).

Case 3.—V. agreed with P. to sell him goods, drawing bills on him for the price, and shipping them to G. at Z. V. packed the goods, and forwarded them to London in bales marked Z., and addressed to the S., a ship named by P., and bound for Z. The railway company advised P. of the arrival of the goods in London, and that "they remained at his order, and were held by the company as warehousemen at his risk," adding "will be sent to the S." They were so sent and shipped. *Held*, that the transit lasted till the arrival of the goods at Z., and V. could therefore stop *in transitu* at any time before such arrival (u).

Case 4.—V. sold goods to P., P. saying nothing about their destination. P. resold to K., and arranged with K. that the goods should be forwarded to Z. by steamer from X. P. then directed V. to send the goods to K. at X. V. did so, and the railway company gave K. notice that they held the goods as his warehousemen. *Held*, that V.'s right to stop *in transitu* was at an end (x).

Case 5.—P., a commission agent, received orders from clients in Australia to buy goods. P. made contracts of purchase from V. and five other vendors in Manchester, not disclosing his Australian principals. The goods were to be delivered in Manchester. P. directed the vendors to forward the goods to I. & Co. of Liverpool (agents of the owners of the S. steamer, and forwarding agents) for shipment on the S. and the goods to be marked Adelaide. P. also wrote to I. & Co., directing them to ship all the goods of the six vendors under one bill of lading to the order of P. The goods were shipped and the S. sailed. P. became insolvent. V., attempting to stop *in transitu*, gave I. & Co. an indemnity, obtained a separate bill of lading for his goods, and took delivery of them in Australia. *Held*, that V. was entitled to stop *in transitu* (y).

(t) *Bethell v. Clark* (1888), 20 Q. B. D. 615. *Cf. Lyons v. Hoffnung* (1890), 15 App. C. 391.

(u) *Ex parte Watson* (1877), 5 Ch. D. 35.

(x) *Kendal v. Marshall* (1888), 11 Q. B. D. 356.

(y) *Kemp v. Ismay Imrie & Co.* (1909), 14 Com. Cas. 202. *Cf. Reddall v. Union Castle Co.* (1914), 20 Com. Cas. 86, and contrast *In re Gurney* (1892), 67 L. T. 598.

3. The transit may be ended by agreement (*z*) between the carrier, wharfinger, or forwarding agent on the one hand, and the consignee on the other, that the former shall hold the goods, not as carrier but as vendee's agent (*a*). The fact that the carrier still claims a lien on the goods will not prevent his holding as vendee's agent, so as to bar the vendor's right of stoppage (*b*).

Note.—There must be a mutual understanding; thus, the intention of the carrier alone, not assented to by the consignee, will not suffice (*c*): nor will the demand of the vendee if not assented to by the carrier (*d*), provided such refusal to deliver is not wrongful (*e*). *Quære*, whether the transit could be so ended during the voyage by agreement between carrier and consignee. It could be by actual delivery to the consignee; why not by the agreement of the carrier to hold as the vendee's agent? Yet this would seriously affect the vendor's rights.

Case 1.—V. sold oil to P., and forwarded it by carrier to Z. On its arrival at Z. the carrier gave notice to P., who signed for it in the carrier's books. *Held*, that the transit was over (*f*).

Case 2.—V. sold goods to P., who lived at Z., and forwarded the goods to Z. by steamer. On arriving, the steamer was discharged into B.'s warehouse. B. was agent of the steamer, and usually held such goods at the risk and subject to the orders of the consignee. In this case he had no orders, as P., being bankrupt, had absconded before the arrival of the goods. V. gave B. notice to stop the goods. *Held*, that the transit was not ended by delivery of the goods to B., who could not be P.'s agent without authority from P. (*g*).

(*z*) *James v. Griffin*, *vide supra*; *Bolton v. L. & Y. Railway* (1866), L. R. 1 C. P. 431; *Ex parte Barrow* (1877), 6 Ch. D. 783.

(*a*) Sale of Goods Act, 1893, s. 45, sub-s. 3; *James v. Griffin* (1837), 2 M. & W. 623; *Ex parte Gouda* (1872), 20 W. R. 981; *Whitehead v. Anderson* (1842), 9 M. & W. at pp. 534, 535; *Reddall v. Union Castle Co.* (1914), *ubi supra*.

(*b*) *Allan v. Gripper* (1832), 2 C. & J. 218; *Kemp v. Falk* (1882), 7 App. C. at p. 584. On the other hand, if the transit is not at an end the fact that the carrier refrains from delivering the goods to the vendee only because the carrier is exercising his lien for charges will not put an end to the vendor's right of stoppage. *Mechan v. N. E. Ry. Co.* (1911), Sess. Cas. 1848.

(*c*) *Edwards v. Brewer* (1837), 2 M. & W. 375.

(*d*) *Jackson v. Nichol* (1839), 5 Bing. N. C. 508; *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44.

(*e*) *Bird v. Brown* (1850), 4 Ex. 786.

(*f*) *Ex parte Gouda* (1872), 20 W. R. 981.

(*g*) *Ex parte Barrow* (1877), 6 Ch. D. 783.

Case 3.—V. sold goods to P., and forwarded them by ship. P. pledged the bill of lading to I. and became bankrupt. When the ship reached the Thames, I. paid the freight to the brokers and obtained an overside order for delivery. On presenting this at the ship before she began to unload, I. was told that he should have the goods as soon as they could be got at. Before unloading began, V. stopped the goods. *Held*, that the transit was not ended by I.'s transactions, and that V. was entitled to stop (*h*).

Article 70.—Notice to stop, how given.

Notice to stop *in transitu*, to be effective, must be given either to the person holding the goods (as the captain of the ship or the warehouseman), while the goods are still *in transitu*, or to the shipowner or principal, whose servant has the custody of the goods, in such a time that he can by reasonable diligence forward it to his servant in time to prevent delivery; and it is his duty so to forward it (*i*).

Semble, that delivery by mistake after such a notice is received by the person in whose possession the goods are, will be ineffectual to rob the vendor of his remedy against the carrier (*k*).

(*h*) *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44.

(*i*) Sale of Goods Act, 1893, s. 46; *Whitehead v. Anderson* (1842), 9 M. & W. at p. 534; *Kemp v. Falk* (1882), 7 App C. at p. 585; *per* Lord Blackburn, who suggests that his view is at variance with that expressed by Bramwell, L.J., in the Court below (*Ex parte Falk*, 14 Ch. D. at p. 455), who said, "I cannot think that any duty was imposed on the shipowners at L. to stop the goods; it would be monstrous to hold that the telling some one else to stop the goods amounts to a stoppage *in transitu*." The first sentence is contrary to *Whitehead v. Anderson* (at p. 534). But the last sentence is clearly right, as notice to the shipowner, not reaching the captain, could not prevent the consignee from obtaining the goods, the vendor's remedy being against the shipowner. *Litt v. Cowley* (1816), 7 Taunt. 169, seems to decide further that delivery by an agent, who through mistake or neglect of his principal has not been informed of a notice to stop duly given to the principal, does not prevent the vendor from maintaining trover against the vendee, but as the case proceeds on the view, now abandoned, that notice to stop rescinds the contract, the position can hardly now be justified. It seems therefore that in such cases the remedy is against the carrier only; for the vendor cannot claim the property, which has passed, or his lien, which has been lost, or possession, which has been abandoned. From this point of view see *Short v. Simpson* (1866), L. R. 1 C. P. 248, at p. 255. For an ineffectual notice to stop, see *Pheps v. Comber* (1885), 29 Ch. D. 813.

(*k*) *Litt v. Cowley* (1816), 7 Taunt. 169; *Short v. Simpson*, *vide supra*.

*Article 71.—Master's Duty on receiving Notice.—
Shipowner's Rights as to Freight.*

It is incumbent on the master to give effect to a claim to stop *in transitu* by delivery of the goods to the vendor, and not merely by abstaining from delivery to the vendee, as soon as he is satisfied that the claim is made by the vendor, unless he is aware of an answer in law to such claim (*l*). If he fails to deliver the goods to the vendor, or as directed by him, the shipowner is liable to a claim by the vendor for conversion (*m*). He can protect himself by an indemnity from the person to whom he delivers, or in case of a double claim, can interplead.

The vendor is bound to take delivery of the goods and to discharge any lien upon them for freight (*n*). And if, on his instructions, the goods are landed short of the bill of lading destination, the freight for which he is liable as damages will be the whole freight to that destination (*o*).

*Article 72.—Indorsement of Bill of Lading as a
Mortgage.*

The effect of indorsement of a bill of lading may be to show an intention to pass, and therefore to pass, the legal estate in the goods to the indorsee as security by way of mortgage for an advance, leaving the indorser an equitable right to redeem them (*p*).

(*l*) Sale of Goods Act, 1893, s. 46, sub-s. 2; *The Tigriss* (1863), 32 L. J. Adm. at pp. 101, 102.

(*m*) *The Tigriss* (1863), 32 L. J. Adm. 97, 101; *Booth v. Cargo Fleet Co.*, (1916) 2 K. B. 570.

(*n*) *Booth v. Cargo Fleet Co.*, (1916) *ubi supra*. The vendor does not become a party to the contract of carriage or liable for the freight *eo nomine* under that contract.

(*o*) *Booth v. Cargo Fleet Co.*, (1916) *ubi supra*. The shipowner must prove his readiness to carry to the ultimate destination, if that be questioned.

(*p*) *Sewell v. Burdick* (1884), 10 App. C. 74. As to the difference, in general, between a mortgage and a pledge, see *In re Morritt* (1886), 18 Q. B. D. at pp. 232, 235.

Article 73.—Indorsement of Bill of Lading as a Pledge.

The indorsement may have the effect of giving the indorsee an equitable interest as security by way of pledge for an advance, accompanied by a power to obtain delivery of the goods when they arrive, and if necessary to realise them for the purpose of the security (*q*). If such goods are not delivered to the pledgee of the bill of lading, he can bring trover or detinue at common law for them, though the defendant's parting with the goods was before the plaintiff acquired his title (*r*).

An indorsement of bills of lading in blank, and their deposit so indorsed by way of security for money advanced (*s*), without more, will be held to be a pledge (*t*).

Note.—It is impossible to state with any confidence what dealings with a bill of lading will amount to a mortgage as distinguished from a pledge. Probably none of the ordinary commercial dealings with bills of lading amount to mortgages, and the difference between mortgages and pledges is immaterial from a commercial point of view, as it lies chiefly in the exact legal remedies for enforcing the security.

Case 1.—F. shipped goods to Z. on A.'s ship, taking a bill of lading, making the goods deliverable to F. or assigns. F. indorsed the bill in blank, and deposited it with I. as security for an advance. I. never claimed the goods under the bill of lading. *Held*, that the transaction amounted to a pledge of the goods represented by the bill of lading (*t*).

Case 2.—F. sold cheese to G. and shipped it on board A.'s ship, taking bills of lading to order of F. or assigns. F. drew bills of exchange on G. for the price, which he sold to the T. Bank, with bills of lading attached indorsed in blank. The T. Bank forwarded the bills to their agents in London with a hypothecation note of the goods attached. On arrival of A.'s ship, A. deposited the goods with X., instructing them to hold the goods to his

(*q*) *Sewell v. Burdick*, *ante*. The person indorsing the bill of lading as security for advances still retains sufficient interest in the goods to enable him to bring an action for damage to them: *The Glamorganshire* (1888), 13 App. C. 454.

(*r*) *Bristol Bank v. Midland Ry. Co.*, (1891) 2 Q. B. 653. *Cf. London Joint Stock Bank v. Amsterdam Co.* (1910), 16 Com. Cas. 102.

(*s*) It will require the stamp suitable for a pledge, and not for a mortgage: *Harris v. Birch* (1842), 9 M. & W. 591.

(*t*) *Sewell v. Burdick* (*ubi supra*).

order. G. induced X. to deliver the goods to him without any order from A., and then by fraud G. induced the Z. Bank to take up the bills of exchange, receiving with them the bills of lading. Z. got delivery orders from A. and presented them to X. When it was found that G. had procured X. to deliver to him the goods without any order from A., Z. sued X. for conversion. *Held*, that Z. were pledgees of the goods, and could sue for conversion, though X. had converted them at a time when Z. had no title (*u*).

Article 74.—Ineffectual Indorsements (x).

An indorsement of the bill of lading may pass no property or title to the indorsee, as:—

(1) Where the indorser has no property to pass (*y*); having, *e.g.*, already indorsed one bill of lading of a set so as to pass the property (*z*).

(2) Or where there is no consideration for the indorsement (*a*);

(3) Or where the circumstances show that no property was intended to pass, as in the case of an indorsement to an agent to enable him to sell, or to stop *in transitu* (*b*);

(4) Or where the indorsee knows of facts which prevent the indorsement from being effective (*c*), as the open insolvency of a consignee who has not paid the price of the goods (*d*);

(5) Or where at the time of the indorsement the ship-owner has already delivered the goods to a person entitled to have them delivered to him (*e*).

(*u*) *Bristol Bank v. Midland Ry. Co.*, (1891) 2 Q. B. 653.

(*x*) This article must be read subject to the provisions of the Factors Acts, which it is beyond the province of this work to deal with.

(*y*) *Finlay v. Liverpool S.S. Co.* (1870), 23 L. T. 251, at p. 255; *Gurney v. Behrend* (1854), 3 E. & B. at p. 634. *Cf. Delaurier v. Wyllie* (1889), 17 Sc. Sess. C., 4th Ser. 167 (as to the iron).

(*z*) *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317.

(*a*) *Per Lord Selborne*, 10 App. C. 80; *Waring v. Cox* (1808), 1 Camp. 369.

(*b*) *Waring v. Cox*, *vide supra*; *Patten v. Thompson* (1816), 5 M. & S. 350; *Tucker v. Humphrey* (1828), 4 Bing. 516.

(*c*) *Dick v. Lumsden* (1793), 1 Peake, 189; *Cuming v. Brown* (1807), 1 Camp. 104; *Gilbert v. Guignon* (1872), L. R. 8 Ch. 16.

(*d*) *Vide* Article 65.

(*e*) *Cf. Channell, J., London Jt. St. Bank v. British Amsterdam* (1910), 16 Com. Cas. 102, at p. 105.

But where the indorser has the property, even though such property has been obtained by fraud, an indorsement for valuable consideration to a *bonâ fide* indorsee, before the original owner or indorser has obtained a legal rescission of the transfer, will pass the property (*f*).

Case 1.—Goods consigned to P. were in course of transit landed at a sufferance wharf on the Thames, subject to a stop for freight by A. and to a stop for advances by I., a mortgagee on security of a set of three bills of lading. P. obtained from K. a loan, with which he redeemed the bills from I. and indorsed two to K. as security for his advance. P. obtained another advance from M., to whom he indorsed the third bill. With this advance the stop for freight was removed, and M. obtained the goods from the sufferance wharf on production of his indorsed bill. *Held*, that the property in the goods having passed to K. by the first indorsement, the second conferred no property on M., and K. could recover from him the goods or their value (*g*).

Case 2.—V. shipped to P. oilcake, sending the bill of lading to V.'s agent, W., with instructions not to part with it "without first receiving payment." P. gave W. a bill of exchange accepted by K., and promised immediate payment in cash, on which W. delivered to P. the indorsed bill of lading. P. indorsed the bill of lading to I., who took it *bonâ fide* and for value. P. and K. then became bankrupt, without paying W. *Held*, that though P. had obtained the bill of lading by fraud, he could transfer the property in the goods by its indorsement to I., a *bonâ fide* holder for value (*h*).

Article 75.—Effects of Indorsement under the Bills of Lading Act, 1855 (i).

Such an indorsement of the bill of lading as passes to the indorsee the property, whether legal or equitable (*k*),

(*f*) *Pease v. Gloahec* (1866), L. R. 1 P. C. 219; *The Argentina* (1867), L. R. 1 A. & E. 370.

(*g*) *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317.

(*h*) *The Argentina* (1867), L. R. 1 A. & E. 370.

(*i*) 18 & 19 Vict. c. 111, s. 1, see Appendix III. Until this Act was passed the indorsement of a bill of lading would not affect the contract evidenced in it, and the indorsee could not sue or be sued on such contract, though he was the person really interested in the goods, the subject of the contract: *Thompson v. Dominy* (1845), 14 M. & W. 403; *Howard v. Shepherd* (1850), 9 C. B. 297.

(*k*) *Sewell v. Burdick* (1884), 10 App. C. at pp. 85, 95.

in the goods, also vests in him all the rights (*l*) and liabilities arising in respect of such goods from the contract evidenced in the bill of lading (*m*).

He may lose such rights and liabilities by such a further indorsement of the bill of lading as divests him of the property (*n*).

An indorsee of a bill of lading as security for an advance, whether the transaction amounts to a pledge (*o*), or, *semble*, to a mortgage (*p*), does not become liable under the contract evidenced in the bill of lading, until he completes his inchoate title by taking possession of the goods under the bill so indorsed (*o*).

Such a vesting of rights and liabilities by indorsement of a bill of lading does not in any way affect the shipowner's right against the original shipper or owner of the goods for the freight (*q*), or the liability of the consignee or indorsee by reason of his being such consignee or indorsee, or of his receiving the goods in con-

(*l*) Including the right to restrain by injunction threatened breaches by the shipowner of the contract contained in the bill of lading: *Wood v. Atlantic Transport Co.* (1900), 5 Com. Cases, 121.

(*m*) The indorsement does not vest in the indorsee any rights and liabilities arising otherwise than from such contract: *Leduc v. Ward* (1888), 20 Q. B. D. 475. If the indorsee proves that the immediate indorsement to him was for valuable consideration, he need not also prove that the indorsement to his indorser was for value, in the absence of any evidence of fraud or other circumstances invalidating the indorsement: *Dracachi v. Anglo-Egyptian Navigation Co.* (1868), L. R. 3 C. P. 190.

(*n*) *Smurthwaite v. Wilkins* (1862), 11 C. B. N. S. 842; but see *Corlett v. Gordon* (1813), 3 Camp. 472; *Lewis v. M'Kee* (1868), L. R. 4 Ex. 58. Though the indorsee has agreed to resell the property, if the bill of lading is still an effective instrument he will not lose his rights and liabilities under it, till he has reindorsed it so as to pass the property: *The Felix* (1868), L. R. 2 A. & E. 273; *Fowler v. Knoop* (1879), 4 Q. B. D. 299.

(*o*) *Sewell v. Burdick* (1884), 10 App. C. 74, *per* Lord Selborne, at pp. 88, 89, explaining *The Freedom* (1871), L. R. 3 P. C. 594; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106. See also *Allen v. Coltart* (1883), 11 Q. B. D. 782, at pp. 784, 785.

(*p*) *Per* Lord Blackburn, 10 App. C. at pp. 96, 97.

(*q*) *Fox v. Nott* (1861), 6 H. & N. 630, where the bill was indorsed to the shipowner himself: *Short v. Simpson* (1866), L. R. 1 C. P. 248.

sequence of such consignment or indorsement, or any right of stoppage *in transitu* (r).

Case.—F. shipped goods to Z. on A.'s ship, taking a bill of lading, making the goods deliverable to F. or assigns, freight payable at Z. F. pledged the bills as security for an advance by indorsing them in blank, and depositing them so indorsed with I. F. did not claim the goods at Z., and they were sold by the authorities there to pay custom-house charges. I. took no steps to obtain the goods. A. sued I. for freight as indorsee of the bill of lading. *Held*, that as I. had taken no steps to complete his title by claiming the goods under the bill of lading, he was not liable on the contract evidenced in it (s).

Article 76.—Position of Indorsee.

The lawful holder of a bill of lading, in whom the property in the goods is vested, may by indorsement transfer a right greater than he himself has; for he transfers his position under the contract evidenced in the bill of lading, but does not transfer any other rights or liabilities which may be vested in him against, or to, the shipowner, charterer, or original shipper, unless the indorsee has notice of such rights and liabilities (t).

Case 1.—F., shippers of goods, indorsed to I. a bill of lading stating that the goods were shipped on board the S. lying at Fiume and bound for Dunkirk. The ship deviated from the ordinary voyage between those two ports and was lost on such deviation. I. sued the shipowners, who pleaded that F. knew of the intention to deviate before shipment. *Held*, that F.'s knowledge did not affect I (u).

Case 2.—C. chartered a ship from A. and shipped goods in it, receiving a bill of lading from the master. C. saw the method of

(r) 18 & 19 Vict. c. 111, s. 2. An indorsement of a bill of lading has by this Act no further effect on the right of stoppage than it would have had before the Act.

(s) *Sewell v. Burdick* (1884), 10 App. C. 74. See also *Fowler v. Knoop* (1879), 4 Q. B. D. 299.

(t) *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393; *The Helene* (1865), B. & L. at p. 424; *The Emilien Marie* (1875), 44 L. J. Adm. 9; *Jenkyns v. Usborne* (1845), 8 Scott, N. R. 505; *Leduc v. Ward* (1888), 20 Q. B. D. 475. The ordinary case of defeat of stoppage *in transitu* by indorsement to a *bonâ fide* holder falls under this principle.

(u) *Leduc v. Ward*, *vide supra*.

stowage and did not object to it. C. indorsed the bills to I. The goods were damaged by the method of stowage. I. sued A. on the contract in the bill of lading. *Held*, that I. was not affected either by C.'s position under the charter or by C.'s knowledge of the method of stowage (x).

Article 77.—Effects of the Indorsement of the Bill of Lading under the Admiralty Court Act, 1861 (y).

The elaborate discussion of the many cases upon sect. 6 of the Admiralty Court Act, 1861, which in all former editions has formed the subject-matter of this Article, is now obsolete. The section has been repealed by the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81, s. 21).

Section 5 of the Administration of Justice Act, 1920, which is printed in Appendix III., at p. 456, now takes the place of the repealed section. The effect of this is to make the jurisdiction of the Admiralty Division of the High Court practically the same in its nature, though without limitation of the amount involved, as that hitherto enjoyed by County Courts under the County Courts Admiralty Jurisdiction Amendment Act, 1869. The new section, however, still preserves the condition that the jurisdiction shall not arise if at the institution of the proceedings any owner or part-owner of the ship is domiciled in England or Wales, a provision which was contained in section 6 of the Admiralty Court Act, 1861, but does not appear in the County Courts Admiralty Jurisdiction Act of 1868, or the County Courts Admiralty Jurisdiction Amendment Act of 1869.

(x) *The Helene*, *vide supra*.

(y) 24 Vict. c. 10, s. 6.

SECTION VI.

LIABILITY OF SHIPOWNER FOR LOSS OF, OR DAMAGE TO,
GOODS CARRIED.*Article 78.—Liability of Shipowner in Absence of
Express Stipulations.*

IN the absence of express stipulations in the contract of affreightment (a), and subject to certain statutory exemptions from, and limitations of, liability (b), all shipowners who are common carriers for reward (c) (*i.e.* who offer their ships as general ships for the transit of the goods of any shipper), are liable for any loss of or damage to such goods in transit, unless caused by the act of God, or the King's enemies, or by the inherent nature of the goods themselves (d), or by their having

(a) See Article 3, and *Lipton v. Jescott Steamers* (1895), 1 Com. Cases, 32.

(b) See Merchant Shipping Act, 1894, ss. 448 (2) (dangerous goods), 502 (fire, valuables, &c.), 503 (limitation of amount of damages), *infra*, Appendix III. The exemption from liability for loss or damage caused by the fault of a compulsory pilot, under sect. 633 of the Merchant Shipping Act, 1894, has ceased to exist since 1 Jan. 1918. (See 2 & 3 Geo. V. c. 31, s. 15.) English railway companies who are shipowners have the protection as regards carriage by sea afforded to common carriers by land under the Carriers Act, 1830. See the Railways Act, 1921, sect. 56 and Sched. 6, and see Article 89A, *infra*.

(c) If a carrier is to have no reward he comes within Lord Holt's sixth category of bailments (*Coggs v. Bernard* (1703) 2 Ld. Raym. at p. 918) and is only liable for loss due to negligence.

(d) *Nugent v. Smith* (1876), 1 C. P. D. 19, 422; *Liver Alkali Co. v. Johnson* (1874), L. R. 9 Ex. 338. *Per* Bowen, L.J., in *Pandorf v. Hamilton* (1886), 17 Q. B. D. at p. 683. See Articles 80, 81. This liability is not removed by a practice of the shipowner to insure at the cost of the goods owner, and by his direction: *Hill v. Scott*, (1895) 2 Q. B. 371. The liability is not assumed by a warehouseman who undertakes to have goods brought by barge from the ship to his warehouse, and carries out that arrangement by sub-contract with a lighterman: *Consolidated Tea Co. v. Oliver's Wharf*, (1910) 2 K. B. 395. The phrase "inherent vice" is commonly used of the last ground of exemption. It may be applied figuratively to "anything which by reason of its own inherent qualities is lost without any negligence by any one."

been properly made the subject of a general average sacrifice (e).

Quære, whether a shipowner who is not a common carrier has the same liability as a common carrier (f), or is only liable as a bailee for the exercise of due care and diligence (g).

All shipowners who contract to carry goods undertake absolutely, in the absence of express provisions negating such undertaking, that their ship is seaworthy at the beginning of the voyage (h), and that they will proceed on the voyage with reasonable dispatch (i) and without unnecessary deviation (j).

Note.—In the law, as thus stated, there are two disputed points:—

(1.) Whether the owner of a ship or lighter hired to carry a specific cargo on a particular voyage, as distinguished from a general ship plying habitually between particular ports and carrying the goods of all comers, is in the absence of express agreement a common carrier, and therefore liable, in the absence of express stipulations, for all damage resulting in transit, unless from the act of God or the King's enemies or vice in the goods themselves.

Per Lord Halsbury, *Greenshields v. Stephens*, (1908) App. Cas. 431. The defence of "inherent vice" will include the insufficiency of the packing, and the carrier may rely on that though he knew of the insufficiency (*Gould v. S.E.C.R. Co.* (1920) 2 K. B. 186). In the commercial tribunals in France "Vice propre" in reference to a ship is used as the equivalent of unseaworthiness.

(e) See Articles 107—112, *infra*.

(f) *Per* Brett, J., in *Nugent v. Smith* (1876), 1 C. P. D. at p. 33, and *Liver Co. v. Johnson* (1874), L. R. 9 Ex. at p. 344.

(g) *Per* Cockburn, C.J., in *Nugent v. Smith*, *vide supra*, at pp. 434, 438: compare Lord Herschell, at p. 510, and Lord Macnaghten, at p. 515 of *The Xantho* (1887), 12 App. C. 503; Lord Watson, at p. 526 of *Hamilton v. Pandorf* (1887), 12 App. C. 518; and *Note, infra*. See also *per* Willes, J., in *Notara v. Henderson* (1872), L. R. 7 Q. B. at p. 236; *Grill v. General Colliery Co.* (1866), L. R. 1 C. P. at p. 612. If he has the liability of a carrier he will be liable for damage to the goods carried resulting from causes other than the act of God or the King's enemies, or the vice of the goods themselves, though such damage could not be prevented by reasonable care and diligence on his part and that of his servants. If he has only the liability of a bailee he will be free where he can prove that he and his servants have exercised reasonable care and diligence.

(h) *Steel v. State Line* (1878), 3 App. C. 72, and Article 29.

(i) See Article 30.

(j) See Articles 99, 100.

(2.) Whether, apart from the liabilities of a common carrier, every shipowner or master who carries goods on board his vessel for hire is, in the absence of express stipulations, subject to the liability of an insurer, except as against the act of God or the King's enemies or inherent vice in the goods, or whether he is only liable for loss shewn to have arisen from negligence on his part, or that of his servants.

The practical importance in the case of ships is not very great, as the difference in the law would chiefly affect ships chartered to one shipper without any express stipulations in the charter, an unusual case; but it is important in the case of lighters, which are frequently let out for hire in that way.

I. The first question has been discussed in *Liver Alkali Co. v. Johnson* (1872) (*k*). There, A. was a lighterman and let out his flats to any customer who applied for them; his flats did not ply between any fixed points, but each voyage was fixed by the particular customer; a special bargain was made with each customer, though not for the use of a particular flat; but no flat was carrying goods for more than one person on the same voyage. A. let a flat on these terms to C. to carry salt from L. to W.; on the voyage, without A.'s negligence, the flat was wrecked. C. sued A. for the damage to the salt. The Court, consisting of Kelly C.B., Martin, Bramwell, and Cleasby, B.B., held A. a common carrier, and therefore liable. Kelly, C.B., laid stress on the fact that no particular vessel was hired, saying: "No doubt, if each particular voyage had been made under a special contract containing stipulations applicable to that voyage only, the case would have been different," which seems to distinguish the case of a ship specifically chartered to a particular shipper.

In the Exchequer Chamber the majority of the Court (Blackburn, Mellor, Archibald, and Grove, JJ.) affirmed this judgment (*l*) on the ground that a lighterman, carrying on business as described, "does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries." Brett, J., while agreeing that A. was liable, put his liability on the ground that (*m*) "by a recognised custom of England, every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to

(*k*) L. R. 7 Ex. 267. Cf. *Hill v. Scott*, (1895) 2 Q. B. 371. See also *Consolidated Tea Co. v. Oliver's Wharf*, (1910) 2 K. B. 395, as to a wharfinger who incidentally undertakes lighterage.

(*l*) (1874), L. R. 9 Ex. 338, at p. 341.

(*m*) *Ibid.* at p 344.

carry them at his own absolute risk, the act of God or the Queen's enemies alone excepted," unless he limits this liability by express agreement. He emphatically held that A. was not a common carrier, on the ground that he did not undertake to carry goods for, or charter his flat to, the first comer (and therefore was not liable to an action for refusing to do so, the essential characteristic of a common carrier). The rest of the Court had expressly abstained (n) from examining whether A. was a carrier so as to be liable to such an action, and had confined themselves to deciding that he "had the liability of" (*quære*, the same liability as) "a common carrier." In *Nugent v. Smith* (o), Cockburn, C.J., repeated Brett, J.'s, objection: "I cannot help seeing the difficulty that stands in the way of *Liver Alkali Co. v. Johnson*, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it has never been held, and, as it seems to me, never would be held, that a person who lets out vessels to individual customers on their application was liable to an action for refusing the use of such vessel if required to furnish it" (p).

The judgment, however, may be supported on narrow grounds: (1) It only applies, according to the judgment of the Court below, to cases where no specific vessel is chartered or hired, but there is a contract to carry so much cargo; the case of a specific charter is expressly excluded. (2) The Court above do not decide that A. was a common carrier, but only that a lighterman, contracting to carry goods in some vessel or other, has the same liability as a common carrier. The case therefore may be confined to the calling of lightermen; and whether a lighterman has the liabilities of a common carrier is a question of fact in each particular case (q). At present the leading lightermen on the Thames expressly decline to take the liability of common carriers, and carry on the terms of various clauses, which are not so clearly expressed as might be desired (r).

II. The liability of an insurer, said to be undertaken, in the absence of express agreement, by all shipowners lending

(n) (1874), L. R. 9 Ex. 338 at p. 340.

(o) (1876), 1 C. P. D. at p. 433.

(p) See the case also discussed in *Watkins v. Cottell*, (1916) 1 K. B. 10. And see *Belfast Co. v. Bushell*, (1918) 1 K. B. 210.

(q) *Tamvaco v. Timothy* (1882), 1 C. & E. 1.

(r) See *Tate v. Hyslop* (1885), 15 Q. B. D. at p. 370; *Thomas v. Brown* (1899), 4 Com. Cases, at p. 189; *Price v. Union Lighterage Co.*, (1904) 1 K. B. 412; *Rosin, &c. Co. v. Jacobs* (1909), 14 Com. Cas. 78, 247; 15 Com. Cas. 111; *Travers v. Cooper*, (1915) 1 K. B. 73.

their vessels for hire, rests in modern times on the authority of Lord Esher, who expressed that opinion in 1874, in the case just cited, and repeated it in 1875, in *Nugent v. Smith* (s), where he said, Denman, J., concurring: "The true rule is that every shipowner or master who carries goods on board his ship for hire is, in the absence of express stipulation to the contrary, subject by implication . . . by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies . . . not because he is a common carrier, but because he carries goods in his ship for hire." As the ship there was a general ship, this was *obiter dictum*, but in the Court of Appeal, Cockburn, C.J., admitting that the point was not involved in the case, took occasion to dissent entirely from the view of Brett, J., in a very elaborate judgment, in which he held that no such liability existed, but that shipowners, other than of general ships, were only bailees, and bound to use ordinary care and diligence.

On this two questions arise (1) as to the history of the rule; (2) as to its present position.

I. As to its history, the view of Brett, J., was (t) that the common law of England as to bailments is founded on the Roman law, that therefore bailees are liable only for ordinary care unless they fall within certain classes, who are absolute insurers, the historical origin of these classes being found in the Prætor's Edict (u). This historical view has been attacked, I venture to think successfully, by Mr. O. W. Holmes in his work on the Common Law (x).

Cockburn, C.J., took the view (y) that the strict liability of carriers was introduced by custom in the reigns of Elizabeth and James I. as an exception to the ordinary rule that bailees were bound to use ordinary care (z).

(s) 1 C. P. D. at p. 33.

(t) 1 C. P. D. at p. 29.

(u) Dig. IV. 9.

(x) (1882), London, pp. 175-205.

(y) 1 C. P. D. at p. 430.

(z) Liability of innkeepers, *Calye's Case* (1584), 8 Co. 32. Of common carriers by land, *Woodliff's Case* (1596), Moore, 462; Owen, 57. Of common carriers by water, *Rich v. Kneeland* (1613), Hob. 17; Cro. Jac. 330. The first case cited for the general liability of shipowners is *Morse v. Slue* (1671), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Vent. 190, 238; 1 Mod. 85; Sir T. Raym. 220. The reason for the liability of a common carrier is stated by Lord Holt (*Coggs v. Bernard* (1703) 2 Ld. Raym. at p. 918) and by Lord Mansfield (*Forward v. Pittard* (1785) 1 T. R. at p. 34) to be the avoidance of collusion whereby the carrier "may contrive to be robbed on purpose and share the spoil."

Holmes maintains that the stricter liability is the older of the two, and that the present liability of carriers is therefore a survival of the old rules (a).

II. As to the rule of law now prevailing, later cases in the House of Lords (b), supported as they are by several *dicta* of Willes, J., e.g. "the shipowner's exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence" (c); . . . "The contract in a bill of lading is to carry with reasonable care unless prevented by the excepted perils" (d); and also by the judgments in *Laurie v. Douglas* (e), where a direction to the jury that "a shipowner was only bound to take the same care of goods as a person would of his own goods, i.e. an ordinary and reasonable care," was held a proper direction, and in *The Duero* (f), render it hardly safe at present to adopt the view advocated by Lord Esher. But the question so far as it is of practical importance is fully discussed below (g).

(a) The fuller discussion of the historical question is beyond the scope of this work. The reader may refer to Holmes, C. L. c. 5, Bailments, and to the following cases: *Southcote v. Bennet* (1601), 4 Rep. 83, b. Cro. Eliz. 815 (adversely discussed by Lord Holt in *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, and Sir W. Jones on Bailments, 3rd ed. pp. 41-45); *Rich v. Kneeland* (1613), *vide supra*; *Symons v. Darknoll* (1628), Palmer, 523; *Nicholls v. Moore* (1661), 1 Sid. 36; *Matthews v. Hopkin* (1667), 1 Sid. 244; *Morse v. Slue* (1671), *vide supra*; *Goff v. Clinkard* (1750), 1 Wils. 282, n.; *Dale v. Hall* (1750), 1 Wils. 281; *Barclay v. Cuculla* (1784), 3 Dougl. 389; *Trent Navigation v. Ward* (1785), 3 Esp. 127; *Forward v. Pittard* (1785), 1 T. R. 27; *Lyon v. Mells* (1804), 5 East, 428.

The two English exceptions to the carrier's liability, which are different from the Roman ones, have each a purely English history. The exception, "the act of God," results from the discharge of contractors from performance rendered impossible by the act of God (Holmes, 202); that of "the King's enemies," from the rule that the bailee had no action against them, they not being amenable to civil process; and that therefore it was not fair that the bailor should sue him (Holmes, 177, 201; *Marshal of Marshalsea's Case*, Y. B. 33 Hen. 6, 1 pl. 3).

(b) *The Xantho* (1887), 12 App. C. 503; *Hamilton v. Pandorf* (1887), 12 App. C. 518.

(c) *Notara v. Henderson* (1872), L. R. 7 Q. B. at p. 236.

(d) *Grill v. General Iron Screw Co.* (1866), L. R. 1 C. P. at p. 612.

(e) (1846), 15 M. & W. 746; doubted on other grounds in *The Accomac* (1890), 15 P. D. 208.

(f) (1869), L. R. 2 A. & E. 393.

(g) p. 231.

Article 79.—The Effect of Excepted Perils in the Contract of Affreightment.

Charterparties contain an undertaking by the shipowner and charterer to perform their respective parts of the contract, unless prevented (*h*) by certain perils excepted in the contract, provided that such perils could not have been avoided by reasonable care and diligence on the part of the person prevented by them from performing the contract, and of his servants. Bills of lading contain an undertaking by the shipowner or carrier to deliver safely the goods set forth in them, unless prevented by certain perils known as "excepted perils" or exceptions, provided that such perils and their consequences could not have been avoided by reasonable care and diligence on the part of the shipowner or carrier and his servants (*i*). For the consequences resulting solely from the occurrence of these perils, the shipowner or charterer under a charterparty (*k*), the shipowner or carrier under a bill of lading, are not liable. In considering whether the breach complained of is *caused* by an excepted peril, the immediate, the direct (*l*), or dominant (*m*) cause, and not the remote cause, is looked to (*n*).

(*h*) On the question how far the exceptions protect the charterer, as well as the shipowner, see *Note 2* on p. 233.

(*i*) The authorities for this statement are discussed in *Note 1* below. See also *per* Lord Esher in *Bulman v. Fenwick*, (1894) 1 Q. B. 174, as to strikes; *The Glendarroch*, (1894), P. 226 (C. A.); *per* Collins, M. R., in *Dunn v. Currie*, (1902) 2 K. B. 614, at p. 621; *Searle v. Lund* (1903), 20 Times L. R. 390; *Dampskibsselskabet Danmark v. Poulsen* (1913), Sess. Cas. 1043.

(*k*) As between shipowner and charterer, the exceptions in the charter are of importance; as between shipowner or charterer, and shipper, the exceptions in the bill of lading. On the relation between exceptions in the charter and bill of lading where the charterer is also the shipper, see *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67; and Article 18 (*a*).

(*l*) *Per* Lord Sumner in *Becker, Gray v. London Assurance Corporation*, (1918) A. C. at p. 114.

(*m*) *Per* Lord Dunedin in *Leyland v. Norwich Union Co.*, (1918) A. C. at p. 363.

(*n*) *Causa proxima, non remota, spectatur*. See for illustrations of this rule, *Leyland S. Co. v. Norwich Union Ins. Society*, (1918) A. C. 350; *The Xantho* (1887), 12 App. C. 503; *Hamilton v. Pandorf* (1887), 12 App. C. 518; *Letricheux v. Dunlop* (1891), 19 Sc. Sess. C. 209; and

Note 1.—It is submitted that the statement in the text is the true result of the cases in the House of Lords (o), though language is there used apparently capable of another construction. Lord Herschell in *The Xantho*, at p. 510, said: "The true view" (of the difference between a policy of marine insurance and a contract of affreightment) "appears to me to be presented by Willes, J. (p), when he said: 'A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent it coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the seas is caused by previous default of the shipowner, he is liable for this breach of his contract.'"

This view finds some support in cases of about seventy years ago, *e.g.*, in the decision of the Court of Exchequer in *Laurie v. Douglas* (q), where a direction to the jury that a shipowner was only bound "to take the same care of goods as a person would of his own goods, *i.e.*, an ordinary and reasonable care," was held a proper direction. But if the contract is as stated by Willes, J., and approved by Lord Herschell, "to carry with reasonable care, unless prevented by the excepted perils," the exceptions become meaningless; there is no need for any excepted perils. For no loss is caused by an excepted peril, which the shipowner could have prevented by reasonable care. No peril is an "act of God," if it could have been prevented by reasonable foresight and care (r). No peril is a "peril of the sea," "which could be

individual exceptions, *post*. In *Smith v. Rosario Co.*, (1893) 2 Q. B. at p. 328, delay on the voyage by barnacles, which had accumulated while the ship was detained in port by restraints of princes, was held covered by that exception.

(o) *The Xantho* (1887), 12 App. C. 503; *Hamilton v. Pandorf* (1887), 12 App. C. 518.

(p) *Grill v. Iron Screw Colliery Co.* (1868), L. R. 1 C. P. at p. 612. See Lord Sumner's view in *Becker Gray's Case*, *v. s.*, (1913) A. C. at p. 113.

(q) (1846), 15 M. & W. 746; see on this case *The Accomac* (1890), 15 P. D. 208.

(r) *Nugent v. Smith* (1875), 1 C. P. D. 34; *Nichols v. Marsland* (1876), 2 Ex. D. 1.

foreseen as one of the necessary incidents of the adventure" (s). It would be sufficient that the contract should read, "to carry with reasonable care." If the shipowner did so, he would not be liable for damage which could be prevented by reasonable care, without the addition of any list of excepted perils. If he did not do so, he would be liable for his omission whatever perils were excepted.

Some light is perhaps thrown on the meaning of the House of Lords by another *dictum* of Willes, J. (t); "The exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care." This appears to represent the contract as stated above, and as one: (1) to carry absolutely at shipowner's risk; (2) unless the damage is caused by excepted perils; (3) provided the shipowner and his agents have used reasonable care to prevent such damage (u). The view is supported by the language of Lord Macnaghten in *The Xantho*, at p. 515, where he classes the implied engagement of reasonable care with the implied warranty of seaworthiness. In this second view, if damage be caused by a peril not excepted, the shipowner is not protected, though he has used due diligence.

The various principles of construction applied to contracts of affreightment and policies of marine insurance lead to different legal results from similar facts. Thus in a bill of lading whose only exception is "perils of the seas," where damage results from a storm, the shipowner will still be liable, if it is proved that the stowage was negligent, and that such negligence co-operated with the storm to damage the goods (x). In a policy of insurance the underwriter would be liable for damage from a storm as a peril of the sea, though it was proved that the ship became unseaworthy on the voyage through negligence of the owner's servants (y).

(s) *The Xantho* (1887), 12 App. C. 503, *per* Lord Herschell, at p. 509.

(t) *Notara v. Henderson* (1872), L. R. 7 Q. B. at pp. 235, 236.

(u) This proviso may itself be excluded by the exception known as the "negligence clause"; *cf.* Article 89.

(x) *The Oquendo* (1873), 38 L. T. 151; *The Catherine Chalmers* (1875), 32 L. T. 847.

(y) *Walker v. Maistland* (1821), 5 B. & A. 171; *Davidson v. Burnand* (1868), L. R. 4 C. P. 117; *Redman v. Wilson* (1845), 14 M. & W. 476. For further illustration of the difference in principle, consider *Cory v. Burr* (1883), 8 App. C. 393; *West India Telegraph Co. v. Home Insurance Co.* (1880), 6 Q. B. D. 51; *Taylor v. Dunbar* (1869), L. R. 4 C. P. 206; *Pink v. Fleming* (1890), 25 Q. B. D. 396; *Reischer v. Borwick*, (1894), 2 Q. B. 548; *Leyland S.S. Co. v. Norwich Union Insurance Co.*, (1917), 1 K. B. 873.

Before 1887 (z) there was some authority for saying that this difference in construction arose either from the different meaning of such terms as "perils of the sea" in the two documents, or from the application of the maxim, "*Causa proxima, non remota, spectatur*," to policies and not to bills of lading. The authority of the House of Lords (z) has now decided that each of these views is erroneous; and that the explanation of the different results already pointed out is to be found in the undertaking of the shipowner in the contract of affreightment, that he and his servants or agents shall not be negligent, which is confined in the policy to an undertaking by the assured that he himself will not contribute to the loss, without reference to the acts of his servants or agents. And it is further clear that to these two undertakings, the maxim "*Causa proxima, non remota, spectatur*," does not apply.

This can also be expressed thus. In applying the rule, "*Causa proxima, non remota, spectatur*," to a policy of insurance, there is one exception, and perhaps two, to its stringent application:—(1) where the loss is more remotely caused by wilful misconduct of the assured; (2) (perhaps) where the loss is more remotely caused by inherent vice of the thing insured (*e.g.* fire from spontaneous combustion). As regards the exceptions to the contract of affreightment, there is a third, viz. where the loss is more remotely caused by the negligence of the shipowner or his servants. It is by virtue of this addition that the rule as to *proxima causa* differs in regard to contracts of insurance and affreightment.

Note 2.—It is obvious that exceptions, of which the most typical is "perils of the seas," were originally inserted in charterparties for the protection of the shipowner. How far they can also be relied upon by the charterer, as limiting his obligations, is purely a question of the construction of any particular charterparty. In many modern charters the various perils are expressed to be "always mutually excepted": in which case beyond question the charterer can claim their benefit, though many of them can rarely have any bearing upon his obligations to load, or discharge, cargo, and to pay freight, &c. As to charterparties in which it is not made clear that the exceptions are to be "mutual," there is some conflict of authority. The point seems to be first directly discussed by Lord Alvanley in *Touteng v.*

(z) *Thames and Mersey Insurance Co. v. Hamilton* (1887), 12 App. C. 484; *The Xantho*, *ibid.* p. 503; *Hamilton v. Pandorf*, *ibid.* p. 518.

Hubbard (a), when he says, "I will first consider for what purpose and for whose benefit the words 'restraints of princes during the said voyage always excepted' were introduced. It appears to me that they were introduced for the benefit of the master, not of the merchant." The first occasion on which any judge suggested that an exception in the charter might avail the charterer seems to be in a *dictum* of Martin, B., in 1870 (b).

In modern times the question has been directly raised. In *Barrie v. Peruvian Co.* (c) the charterer was prevented from loading by a storm which destroyed the loading pier: he was held entitled to rely on the exception of "perils of the seas." This was followed as an authority, but its correctness doubted, by Bigham, J., in *Re Newman and Dale* (d). It was not followed in *Braemount S.S. Co. v. Weir* (e), which concerned a time charterparty. In *Cazalet v. Morris* (f) and in *Aktieselskabet Frank v. Namaqua Co.* (g), the ordinary exceptions clause was held not to apply for the benefit of the charterer, but in both these cases the question of construction was influenced by the fact that the charters also contained special clauses expressly limiting the obligations of the charterer.

In this condition of the authorities *Barrie v. Peruvian Co.* (c) is the only clear case in favour of the view that the exceptions protect the charterer. It must remain a question of construction in each case (h), but *primâ facie* an ordinary exceptions clause, unless expressed to apply to the charterer's obligations, will not do so.

Note 3.—The early bills of lading and charterparties do not contain any exceptions at all (i). The first provision of the

(a) (1802), 3 B. & P. 291, at p. 298. He relies on the decision of Lord Kenyon in *Blight v. Page* (1801), *ibid.* p. 295, n. Other early cases to the same effect are *Sjoerds v. Luscombe* (1812), 16 East, 201; and *Storer v. Gordon* (1814), 3 M. & S. 308.

(b) *Ford v. Cotesworth* (1870), L. R. 5 Q. B. at the bottom of p. 548.

(c) (1896), 2 Com. Cas. 50.

(d) (1903), 1 K. B. 262.

(e) (1910), 15 Com. Cas. 101. In fact even if it had been held that "strikes" was an exception in favour of the charterer, he must have failed in the case on the principle of *Brown v. Turner Brightman* (1912), A. C. 12.

(f) (1916), Sess. Cas. 952.

(g) (1920), 25 Com. Cas. at pp. 217, 218.

(h) See *Aktieselskabet Gordon v. Cape Co.* (1921), 26 Com. Cas. 269. where the question is discussed in detail by the C. A.

(i) See charterparties and bills of lading between 1531 and 1541 printed in Marsden, *Select Pleas in the Admiralty Court* (Selden Society (1892), Vol. I. at pp. 35, 61, 89, 95, 112); West's *Symbolography*: editions 1632 and 1647, printing (sect. 656) a charterparty dated 1582,

sort was "the danger of the sea only excepted" (*k*). As the result of a case tried in 1795 (*l*), the exceptions were enlarged to read "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." This clause has been still further extended, until, as has been said, "there seems to be no other obligation on the shipowner than to receive the freight." The excepted perils vary with each trade and each shipowner; and some great companies have two bills of lading, imposing on them different degrees of liability according to the rate of freight paid. Exceptions are so numerous that an exhaustive enumeration is impossible; but the following is believed to be a tolerably comprehensive list of exceptions which have come before the Courts for judicial interpretation:—

The act of God (*m*).

The King's enemies (*n*).

Pirates (*o*), robbers, thieves, whether on board or not, pilferage (*o*).

Barratry of master and mariners (*p*).

Arrest and restraints of princes, rulers, and peoples (*q*).

and (sect. 659) a bill of lading dated 1598; Malynes, *Lex Mercatoria* (1686), p. 99, setting out the terms of a charterparty from London "to the town of Saint Lucar de Barameda in Spain" and back again. The early charterparty, like the early marine insurance policy, began with the words, "In the name of God, Amen." (West's *Symbolography*, sects. 655, 656). A bill of lading as late as 1766 would end, "And so God send the good ship to her desired port in safety, Amen." (*Wright v. Campbell* (1767), 4 Burr. at p. 2047). A charterparty in French, made at Constantinople between Greeks, and dated 12 June, 1920, was headed, "Au nom de Dieu."

(*k*) Cf. *Wright v. Campbell*, (1767) *ubi supra*. [In Jan., 1919, in an arbitration before me there was produced a bill of lading for a cargo of logwood on a small sailing ship from a port in Mexico to England. The bill, printed in Mexico in English, ran "the dangers of the sea only excepted." It may be of interest to add that the premium paid at Lloyd's, before the ship sailed, for the insurance of the cargo, against war risks only, in June, 1917, was £40 per cent. The premium for the policy against sea risks was 60/• per cent.—F.D.M.]

(*l*) *Smith v. Shepherd*, McLachlan, 4th ed. p. 563; Abbott, 14th ed. pp. 473, 578. There were in that case no exceptions at all, but the decision alarmed shipowners as to their liability. They tried, according to Lord Tenderden, to get a bill passed limiting their common law liability. It passed the Commons but was thrown out by the Lords. Whereupon they generally amended their bills of lading.

(*m*) See Article 80.

(*n*) See Article 81.

(*o*) See Article 85.

(*p*) See Article 88.

(*q*) See Article 82.

Strikes (*r*), lock-outs, or stoppage of labour from whatever cause (*r*).

In case of strikes, etc., time not to count (*s*).

Leakage (*t*), ullage (*u*), spiles (*x*), jettison (*y*).

Injurious effects of other goods (*z*).

Not liable for loss of goods under any circumstances whatsoever (*a*).

Fire (*b*).

Perils of boilers, steam, or steam machinery (*c*), and consequence of defects therein or damages thereto, escape of steam, explosion.

Detention by ice (*d*).

Breakdown of steamer (*d*). Latent defect (*dd*).

Risk of craft (*e*), risk of storage afloat or on shore, save risk of boats so far as ships are liable (*f*).

(*r*) See Article 84.

(*s*) Held to relieve charterers from liability for demurrage only to the extent that time in discharging was in fact lost owing to strike, &c.: *London & Northern Co. v. Centr. Arg. Ry.* (1913), 108 L. T. 527; *Centr. Arg. Ry. v. Marwood*, (1915) A. C. 981.

(*t*) See Article 86.

(*u*) =leakage.

(*x*) =the leakage resulting from holes stopped by a peg called a "spile" bored in a cask for the purpose of getting at its contents, which are sometimes replaced by water. The effect of the exception will be to free the shipowner from liability for leakage and watering, unless the shipper proves negligence of the superior officer.

(*y*) See Article 90.

(*z*) See Articles 31, 86.

(*a*) Held to cover wilful default and misfeasance by shipowner's servants: *Taubman v. Pacific S.S. Co.* (1872), 26 L. T. 704.

(*b*) See sect. 502 of the Merchant Shipping Act, 1894, discussed in Article 87, p. 262. The exception, "fire on board," does not relieve the shipowner from liability to general average contribution for damage done by water in extinguishing such fire: *Schmidt v. Royal Mail S.S. Co.* (1876), 45 L. J. Q. B. 646; *Greenshields v. Stephens*, (1908) App. Cas. 431.

(*c*) Does not apply if the defect was due to negligence: *Siordet v. Hall* (1828), 4 Bing. 607: or if the machinery was unseaworthy at starting, though the defect was latent: *The Glenfruin* (1885), 10 P. D. 103; *The Maori King v. Hughes*, (1895) 2 Q. B. 550; *The Waikato*, (1899) 1 Q. B. 56. "Risks of steam navigation" =physical risks, incidental to ships propelled by steam machinery, such as breakdown of engine, disabling of screw, &c.: *Mercantile S.S. Co. v. Tyser* (1881), 7 Q. B. D. 73.

(*d*) *In re Traae and Lennard*, (1904), 2 K. B. 377.

(*dd*) See *Cargo ex Laertes* (1887), L. R. 12 P. D. 187; *Jackson v. Mumford*, (1902) 8 Com. Cas. 61; *The Dimitrios N. Rallias*, (1922) 13 Ll. L. R. 365.

(*e*) =without risk or liability to the owner of the craft in respect of the carriage of the goods: *Webster v. Bond* (1884), 1 C. & E. 338; but held not to protect shipowner from loss by negligence or unseaworthiness: *The Galileo*, (1915) A. C. 199.

(*f*) Held to protect from liability for any loss occurring to goods in boats, which shipowners would not be liable for, had it occurred in ships: *Johnston v. Benson* (1819), 4 Moore, C. P. 90.

At ship's risk (*g*).

At ship's risk (when signed for alongside) but in all other respects the act of God, etc., excepted (*h*).

Goods to be forwarded at ship's expense, but owner's risk (*i*).

At shipper's risk (*k*).

Collision (*l*).

Detention by railways (*m*).

Perils of land transit (*n*).

Force majeure (*o*).

Accidents (*p*).

(*g*) In reference to goods alongside held by the C. A. in *Nottebohm v. Richter* (1886), 18 Q. B. D. 63, to mean "at the same risk as if they were on board the ship under the charter" (*i.e.*, subject to the excepted perils), and it was suggested that without such a clause the shipowner's liability would only be for reasonable care till the goods reached the ship.

(*h*) Held, distinguishing *Nottebohm v. Richter* (*ubi supra*), to put the risk of goods while alongside absolutely on the shipowner: *Dampskibsselskabet S. v. Calder* (1911), 17 Com. Cas. 97.

(*i*) Held, in a bill of lading contemplating transshipment, to protect the shipowner against damage caused by negligent stowage on the coasting vessel, but to leave him liable for negligence in transshipment: *Allan v. James* (1897), 3 Com. Cases, 10. In *The Forfarshire*, (1908) P. 339, the clause "all transporting to be at owner's risk" was held to be subject to the condition that reasonable care was used in the transporting. A similar view seems to have been taken as to the clause "at charterer's risk" in *Wade v. Cockerline* (1904), 10 Com. Cas. 115.

(*k*) Held, in a clause as to transshipment in a through bill of lading, not to protect the shipowner from liability for loss by unseaworthiness of lighter: *The Galileo*, (1915) A. C. 199.

(*l*) See Article 83, p. 251.

(*m*) *Letricheux v. Dunlop* (1891), 19 Sc. Sess. C. 209. Cf. *Mein v. Ottman* (1904), 6 F. (Sess. Cas.) 276; *Turnbull v. Cruickshank* (1905), 7 F. (Sess. Cas.) 265; *Glasgow Navigation Co. v. Iron Ore Co.* (1909), Sess. Cas. 1414. This exception usually covers matters preventing a cargo being brought by rail to the port of shipment: *Furness v. Forwood* (1897), 2 Com. Cases, 223; *Richardson v. Samuel*, (1898) 1 Q. B. 261 (C. A.); otherwise, if, though a cargo is stopped on the railway, other cargo can be obtained at a higher price at the port of shipment.

(*n*) Perils of the roads—held to mean "perils peculiar to roads"; whether marine roads, or anchorages, or land roads, was not decided: *De Rothschild v. Royal Mail Co.* (1852), 7 Ex. 734, at p. 743. Compare Lord Herschell on "perils of the sea," 12 App. C. at p. 509.

(*o*) *Yrazu v. Astral Co.* (1904), 9 Com. Cas. 100. Cf. *Matsoukis v. Priestman*, (1915) 1 K. B. 681; *The Concadoro*, (1916) 2 A. C. 199; *Zinc Corporation v. Hirsch*, (1916) 1 K. B. 541; *Lebeaupin v. Crispin* (1920) 25 Com. Cas. 335.

(*p*) *The Torbryan*, (1903) P. 194; *Fenwick v. Schmalz* (1868), L. R. 3 C. P. 313; *Wade v. Cockerline* (1904), 10 Com. Cas. 47, 115. Shortage of labour occasioned by the prevalence of plague is not an "accident preventing or delaying the discharge"; *Mudie v. Strick* (1909), 14 Com. Cas. 135. See also *Denholm v. Shipping Controller* (1920), 4 Ll. L. Rep. 426.

Improper opening of valves (*q*).

Not liable for negligence of shipowner's servants (*r*).

Error in judgment by master (*s*).

Exceptions of all liability, or limited liability, in respect to particular goods (*t*), as glass, specie, precious stones, cattle, &c.

Exceptions as to the amount of liability for goods (*u*), (*x*).

Not accountable beyond net invoice price of goods (*y*), (*x*).

Not liable for any claim (*z*) notice of which is not given within a certain time (*x*).

Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred (*a*).

(*q*) Held to include improperly leaving valves open : *Mendl v. Ropner*, (1913) 1 K. B. 27.

(*r*) See Article 89.

(*s*) Does not cover mistake as to the obligations of the charterparty : *Knutsford Co. v. Tillmans*, (1908) App. Cas. 406. See also *Lord S.S. (Owners) v. Newsum*, (1920) 1 K. B. 846.

(*t*) *Seemle*, that these do not apply, unless the ship is seaworthy at starting : *The Glenfruin* (1885), 10 P. D. 103; *Leuw v. Dudgeon* (1867), L. R. 3 C. P. 17 (note); *Tattersall v. National S.S. Co.* (1884), 12 Q. B. D. 297.

(*u*) *Baxter's Co. v. Royal Mail Co.*, (1908) 1 K. B. 796; 2 K. B. 626 (C. A.).

(*x*) If the damage is by unseaworthiness, and there is no special provision in the bill of lading as to liability for unseaworthiness, these clauses do not protect the shipowner. If, however, there is a special provision as to liability for unseaworthiness, these clauses do avail to protect him : *Bank of Australasia v. Clan Line*, (1916) 1 K. B. 39, which thus reconciles the apparently divergent cases *Tattersall v. National Co.* (1884), 12 Q. B. D. 297, and *Morris v. Oceanic* (1900), 16 T. L. R. 533. This very difficult, if not heroic, feat of reconciliation was previously attempted on other grounds in *Wiener v. Wilsons* (1910), 15 Com. Cas. at p. 303. See also *Atlantic Co. v. Dreyfus*, (1922) 2 A. C. 250. The incorporation of the Harter Act in the bill of lading nullifies such a limitation of liability as being inconsistent with sect. 1 of the Act : *Hordern v. Commonwealth Line*, (1917) 2 K. B. 420. The same result would appear to follow from the incorporation of the Australian Sea Carriage of Goods Act, 1904 (sect. 5), the New Zealand Shipping and Seamen Act, 1908 (sect. 300), or the Canadian Water Carriage of Goods Act (sect. 4).

(*y*) *Nelson v. Nelson*, (1906) 2 K. B. 804.

(*z*) Refers to claims for damage, whether apparent or latent : *Moore v. Harris* (1876), 1 App. C. 318.

(*a*) Held not void as ousting the jurisdiction of the Court, but in a claim for loss by unseaworthiness to be subject to the principle of *Bank of Australasia v. Clan Line* (*ubi supra*); *Atlantic Co. v. Dreyfus*, (1922) 2 A. C. 250. See also *Ford v. Compagnie Furness*, (1922) 2 K. B. 797.

Not liable for damage, unless goods are marked in a particular way (b).

Ship's liability to cease when goods are free of the ship's tackle (c).

Not liable for any damage capable of being covered by insurance (d).

Not responsible for any damage to goods however caused which can be covered by insurance (e).

Not liable for failure to notify consignee (f).

Exceptions expressly negating the shipowner's warranty of seaworthiness (g).

Certificate of surveyor to be accepted as proof of seaworthiness (h).

The maintenance by the owners of the vessel's class shall be considered a fulfilment of every duty, warranty, or obligation, whether before or after the commencement of the voyage (i).

Liberty to call at intermediate ports for any purpose, to

(b) For an example of the working of this kind of exception, see *Cox v. Bruce* (1886), 18 Q. B. D. 147; and *Parsons v. New Zealand S.S. Co.*, (1901) 1 K. B. 548.

(c) *Chartered Bank v. British India Co.*, (1909) App. Cas. 369.

(d) The question is whether an underwriter in the ordinary way of business would insure against the particular peril. This exception does not relieve the shipowner from liability to general average: *Crooks v. Allan* (1879), 5 Q. B. D. 38; or from damage caused by the negligence of himself or his servants: *Price v. Union Lighterage Co.*, (1904) 1 K. B. 412 (but see and contrast the clause next quoted in the text above); or from damage caused by unseaworthiness: *Nelson v. Nelson*, (1908) A. C. 16. It has been held on this exception that "damage" covers total or partial destruction, but not abstraction of goods: *Taylor v. Liverpool S.S. Co.* (1874), L. R. 9 Q. B. 546.

(e) This, despite the very slight difference from the last-quoted clause, does protect the shipowner from liability for negligence of his servants: *Travers v. Cooper*, (1915) 1 K. B. 73. See *Note 2* on p. 268.

(f) *E. Clemens Horst Co. v. Norfolk, &c. Co.* (1906), 11 Com. Cas. 141.

(g) See Article 29; and *Cargo ex Laertes* (1887), 12 P. D. 187; *Rathbone v. McIver*, (1903) 2 K. B. 378; *Upperton v. Union Castle Co.* (1903), 9 Com. Cases, 50; *Nelson v. Nelson*, (1908) A. C. 16; *South American Syndicate v. Federal Co.* (1909), 14 Com. Cas. 228. In *Wiener v. Wilsons & Furness* (1910), 15 Com. Cas. 294, "unseaworthiness of the vessel" in a through bill of lading which provided that all the exceptions should apply to all stages of the through transit was held to protect the shipowners from liability for damage due to the unseaworthiness of a barge.

(h) *South American Syndicate v. Federal Steam Co.* (1909), 14 Com. Cas. 228.

(i) *Held*, following *Nelson v. Nelson*, (1908) A. C. 16, too vague to protect the shipowner from the consequences of unseaworthiness due to bad stowage: *Ingram v. Services Maritimes*, (1913) 1 K. B. 538.

touch and stay at other ports either in or out of the way, to tow and assist vessels in all situations (*k*), and perform salvage services to vessels and cargo, without being deemed a deviation (*l*).

Owners only liable for ship damage, &c. (*m*).

Inability of ship to execute or proceed on the voyage (*n*).

Or otherwise (*o*).

Et cetera (*p*).

Interventions of sanitary, customs, or other constituted authorities which may hinder the loading (*q*).

Unavoidable accidents and hindrances (*r*).

Obstructions beyond charterer's control (*s*).

Other causes beyond charterer's control (*t*).

Any circumstance beyond the shipowner's control (*u*).

(*k*) See *post*, Article 99; and *Leduc v. Ward* (1888), 20 Q. B. D. 475.

(*l*) *Potter v. Burrell*, (1897) 1 Q. B. 97.

(*m*) Ship damage—such damage as happens by the insufficiency of the ship, or the negligence of those in charge of her: *East India Co. v. Todd* (1788), 1 Bro. P. C. 405.

(*n*) Inability to proceed from lack of men through small-pox is within the exception: *Beatson v. Schank* (1803), 3 East, 233.

(*o*) See *Norman v. Binnington* (1890), 25 Q. B. D. 475; *Baerselmann v. Bailey*, (1895) 2 Q. B. 301; *The Waikato*, (1899), 1 Q. B. 56; *The Torbryan*, (1903) P. 194; *Packwood v. Union Castle Co.* (1903), 20 Times L. R. 59; *Smackman v. General Steam Co.* (1908), 13 Com. Cas. 196.

(*p*) *Ambatielos v. Jurgens*, (1923) A. C. 175.

(*q*) *Watson Brothers v. Mysore Manganese Co.* (1910), 15 Com. Cas. 159.

(*r*) *Crawford v. Wilson* (1896), 1 Com. Cas. 277, held to cover a rebellion during which discharging could only proceed as ordered by a naval officer. See also *Aktieselskabet Argentina v. Von Laer* (1903), 19 Times L. R. 151; and *Phosphate Co. v. Rankin* (1915), 21 Com. Cas. 248. "Unavoidable" means unavoidable by ordinary diligence: *Granger v. Dent* (1829), M. & M. 475. Cf. also *Dampskibsselskabet Danmark v. Poulsen* (1913), Sess. Cas. 1043.

(*s*) Includes the obstruction due to a glut of ships preventing access to berths: *Larsen v. Sylvester*, (1908) A. C. 295; *Leonis Co. v. Rank* (1908), 13 Com. Cas. 161, 295. In *S.S. Milverton Co. v. Cape Town Gas Co.* (1897), 2 Com. Cas. 281, held to cover refusal of authorities to let a ship enter dock, though *semble* this was unnecessary as the ship had never reached her destination. See also *Ambatielos v. Jurgens*, (1923) A. C. 175.

(*t*) As to the effect on these wide words of the doctrine of *eiusdem generis*, see Note 4, *infra*. In any case the "cause" must be something abnormal. If a charterer undertakes to do a thing (*e.g.*, discharge in so many hours) which in all circumstances is impossible for him, the cause or causes which prevent his doing it cannot be within such a clause. Cf. *France Fenwick v. Spackman* (1912), 18 Com. Cas. 52, at p. 57.

(*u*) Does not cover an incident (the fumigation of the ship at a port of call by compulsion of the local law) which the shipowner at the time of shipping the goods knew that the ship must encounter: *Ciampa v. British India Co.*, (1915) 2 K. B. 774.

Causes that "prevent" or "hinder" performance (x).

Note 4.—Ejusdem generis.—The general rule of construction, that where specific words are followed and amplified by the addition of general words, the latter are to be confined in their application to things of the same kind as the preceding specific words, has often to be taken into consideration upon the interpretation of charterparties and bills of lading. Thus the words "or other causes beyond charterer's control" (following the words "strikes, lock-outs, accidents to railways, factories or machinery") were, in *Richardson v. Samuel* (y), restricted to matters *ejusdem generis*, and held not to cover (1) an arrangement in the port that vessels should load in turn of their arrival; (2) a dismissal of hands preparing cargo for shipment because there was no work for them to do and consequent delay when the cargo came forward. On the other hand, in *Lockie v. Craggs* (z), upon a shipbuilding contract, similar words were applied to include delays affecting a previous vessel, whose presence was contemplated by the parties to the contract. In *In re Allison and Richards* (a) the words were, "riots, strikes, lock-outs, or any cause beyond charterer's control," and it was held that delay through colliers taking an unauthorised holiday was due to a cause within the general words as being *ejusdem generis* with the special words. In *Tillmans v. Knutsford* (b), upon the words "should entry at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause," it was held that ice was not within the general words, not being *ejusdem generis* with the preceding special words. In *Mudie v. Strick* (c), on the words "strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees," it was held that shortage of labour occasioned by plague was not within the general words of the exception. In *Thorman v. Dougate S.S. Co.* (d) it was held that delay by reason of

(x) See *Wilson v. Tennants*, (1917) 1 K. B. 208, and the cases therein discussed. Increased cost of performance (unless so great as to amount to commercial impossibility) is not covered: *ibid.* See also *Phosphate Co. v. Rankin* (1915), 21 Com. Cas. 248. The words "affecting" or "interfering with" may have a wider meaning.

(y) (1898), 1 Q. B. 261. Cf. *Northfield Co. v. Compagnie des Gaz*, (1912) 1 K. B. 434.

(z) (1901), 7 Com. Cas. 7.

(a) (1904), 20 Times L. R. 29, 584.

(b) (1908) 1 K. B. 185; (1908) 2 K. B. 385; (1908) A. C. 406.

(c) (1909), 14 Com. Cas. 135. Upon the facts a new trial was ordered by the C. A. (*ibid.* p. 227), but the judgment of Pickford, J., remains unaffected as to the principle.

(d) (1910) 1 K. B. 410.

the number of ships waiting in the dock to come to the loading tips was not within the exception of "strikes of pitmen or workmen, frosts or storms, delays at spouts caused by stormy weather, and any accidents stopping the working, loading, or shipping of the cargo, also suspensions of labour, lock-outs, delay on the part of the railway company, or any other cause beyond charterer's control" (e). In *Jenkins v. Walford* (f) a shortage of labour was held not to be within the ambit of the clause, "insurrections, riots, fire, frost, floods, strikes, lock-outs, accidents to mills or machinery, or other unavoidable hindrances beyond charterer's control."

It must be remembered that the question is whether a particular thing is within the *genus* that comprises the specified things. It is not a question (though the point is often so put in argument), whether the particular thing is like one or other of the specified things. The more diverse the specified things the wider must be the *genus* that is to include them: and by reason of the diversity of the specified things the *genus* that includes them may include something that is not like any one of the specified things (g).

And, in regard to this rule of construction, it must also be remembered that "*primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before" (h). And the words of the document may themselves make the application of the rule of *ejusdem generis* impossible. Thus, in *Larsen v. Sylvester* (i), the general words were "any

(e) See also *Abchurch S.S. Co. v. Stinnes* (1911), Sess. Cas. 1010. And see *Arden S.S. Co. v. Mathwin* (1912), Sess. Cas. 211, in which the fact that a colliery had restricted its output was held not to be within an exception of "stoppage at collieries."

(f) (1918), 87 L. J. K. B. 136; cf. *Hadjipateras v. Weigall* (1918), 34 T. L. R. 360.

(g) This paragraph is quoted with approval and the whole doctrine of *ejusdem generis* discussed, by McCardie, J., *Owners of S.S. Magnild v. Macintyre* (1920), 25 Com. Cas. 347. (His judgment was reversed on other grounds, 26 Com. Cas. 185.) See also remarks of Greer, J., in *Aktieselskabet Frank v. Namaqua Co.* (1920), 25 Com. Cas. 212.

(h) *Per* Lord Esher, M.R., *Anderson v. Anderson*, (1895) 1 Q. B. at p. 753.

(i) (1908) A. C. 295. In *France Fenwick v. Spackman* (1912), 18 Com. Cas. 52, this case was followed in construing the words "or any cause whatsoever." Contrast *Thorman v. Dowgate Co.*, (1910) 1 K. B. 410, on the words "or any other cause."

other unavoidable accidents or hindrances of what kind soever," and it was held that the words "of what kind soever" made it impossible to limit the generality of the words to one kind, i.e., the *genus* of the preceding specified causes.

Where general words were followed by specific words ending the phrase with "*etc.*," it was held that the doctrine of *ejusdem generis* did not apply to limit the full meaning of the general words (*k*).

Note 5.—The implied undertakings in a contract of affreightment (*l*), e.g., to provide a seaworthy ship, to proceed without unreasonable delay, and without unnecessary deviation, are not affected by exceptions in the bill of lading, unless these latter expressly negative them (*m*); thus the breakdown of a crankshaft, unseaworthy at starting, does not come within the exception "breakdown of machinery"; in other words, exceptions are to be construed "as exceptions to the liability of a carrier, not as exceptions to the liability of a warrantor" (*m*); neither will these exceptions interfere with the operation of express conditions precedent, such as a "cancelling clause" (*n*). The exceptions further only apply to goods stowed in the usual carrying places, and not to goods improperly stowed on deck (*o*).

As regards the effect of deviation upon exceptions, see Article 99, *infra* (*p*).

As regards the effect of unseaworthiness causing fire upon the shipowner's statutory immunity under sect. 502 of the Merchant Shipping Act, 1894, see Article 87, *infra*.

(*k*) "Causes over which the charterers have no control—viz., quarantine, ice, hurricanes, blockades, clearing of the steamer after the last cargo is taken on board, etc." Held to include a strike. *Ambatielos v. Jurgens*, (1923) A. C. 175.

(*l*) See Articles 29, 30, 99.

(*m*) Channell, J., *Bond v. Federal Co.* (1905), 21 Times L. R. at p. 440. And see *The Glenfruin* (1885), 10 P. D. 103. Cf. *The Laertes* (1887), 12 P. D. 187, and cases in Articles 28, 29. See also *Houston v. Sansinena* (1893), 68 L. T. 567 (H. L.); *Searle v. Lund* (1903), 19 Times L. R. 509.

(*n*) *Smith v. Dart* (1884), 14 Q. B. D. 105; but see *Donaldson v. Little* (1882), 10 Sc. Sess. Cases, 413.

(*o*) *Royal Exchange S. Co. v. Dixon*, (1886), 12 App. C. 11.

(*p*) The leading authority is *Morrison v. Shaw Savill*, (1916) 2 K. B. 783. See also and contrast *The Europa*, (1908) P. 84, approved in *Kish v. Taylor*, (1912) A. C. 604, for the difference between unseaworthiness and deviation. It may be summarised by saying that exceptions do not affect liability for loss caused by unseaworthiness; but deviation affects the operation of exceptions by sweeping them out of the contract. As to deviation caused by unseaworthiness, see *Kish v. Taylor*, *ubi supra*.

As regards the time during which the exceptions apply and their relation to the burden of proof, see Article 91.

Note 6.—Exceptions in charterparties stand on a different footing from those in bills of lading.

1. The exceptions in the bill of lading only apply to exonerate the shipowner or carrier; exceptions in the charter may apply to exonerate both shipowner and charterer (*q*), though the shipowner's liability for carriage, where the charterer is also the shipper (*r*), is usually much restricted by the subsequent bill of lading, as against subsequent indorsees for value.

2. The exceptions in the charter are much more concise than those in a bill of lading;—"The act of God, the King's enemies, fire, and all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage always excepted";—being a very usual form.

3. Where the cargo is one in great demand, as in coal charters, or is brought from places inland, as nitrate, ore, or oil, there is frequently a further set of exceptions applying to the clauses as to loading and demurrage, *e.g.*, "any time lost through riots, strike, or stoppage of factory or factories or other hands connected with the working or delivery of the said patent fuel or coals, or by reason of accident to the factories or machinery or obstruction in the canal or dock, or from any cause beyond the personal control of shippers, is not to be computed as part of the loading days."

Article 80.—Act of God.

The exception "act of God" includes any accident as to which the shipowner can shew that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, pains, and care, reasonably to be expected from him (*s*).

(*q*) See *Note 2* on p. 233.

(*r*) See *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67, and Article 18 (*a*).

(*s*) *Per James, L.J.*, in *Nugent v. Smith* (1876), 1 C. P. D. at p. 444; see also *Cockburn, C.J.*, at pp. 437, 438, *Mellish, L.J.*, at p. 441. *Cf. The Marpesia*, L. R. 4 P. C. 212, and for discussions of "inevitable accident," *The Merchant Prince*, (1892), P. 179; *The Albano* (1892), 8

Note.—A stricter view than this was taken by Brett and Denman, JJ., in the Court below (*t*), but was negatived by the Court of Appeal, Mellish, L.J., saying: "I think that in order to prove the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented." This view is supported by *Nichols v. Marsland* (*u*), in which the jury found that a flood was "so great that it could not reasonably have been anticipated, though if it had been anticipated the effect might have been prevented," and the Court of Appeal held that such a flood was an "act of God."

Collision by negligence of another ship, and "pirates," appear to be "perils of the sea," but not "acts of God." On the other hand, the exception "act of God" appears to cover such causes of loss as frost, lightning, &c., which are not perils peculiar to the sea (*x*).

Case 1.—A., a common carrier between L. and A., took on board a mare of F.'s. No bill of lading was signed. Partly by more than ordinarily bad weather, partly by the conduct of the mare, without any negligence by A.'s servants, the mare was seriously injured. *Held*, that A. was not liable for injuries resulting from these causes, which he could not by reasonable care and foresight have prevented, and which therefore came under the exception to a carrier's liability, of damage resulting from the act of God. (*y*).

Case 2.—Goods were shipped under a bill of lading excepting the "act of God." The vessel having to start the next morning, the captain filled his boiler overnight, and, frost coming on, the tubes burst, damaging the goods. *Held*, that the negligence of the captain excluded the exception, though frost was an "act of God" (*z*).

T. L. R. 425. In this case it appears that the principle of the *Glen-darroch*, (1894) P. 226, that the shipowner need not negative negligence, but the goods owner must affirmatively prove it, does not apply.

(*t*) 1 C. P. D. at p. 34.

(*u*) (1876), 2 Ex. D. 1. See, however, the discussion of *Nichols v. Marsland* in *Greenock Corporation v. Caledonian R. Co.*, (1917) A. C. 556.

(*x*) See Article 83, *post*. As to the history of the phrase "act of God," see O. W. Holmes' *Common Law*, p. 202, and note (*a*), p. 229, *supra*.

(*y*) *Nugent v. Smith* (1876), 1 C. P. D. 19, 423.

(*z*) *Siordet v. Hall* (1828), 4 Bing. 607. Rats causing a leak are not "act of God": *Dale v. Hall* (1750), 1 Wils. 281. *Sed quære*, whether on principle if the shipowner could shew that no care or diligence reasonably to be expected of him could prevent there being some rats on a ship, he would not bring himself within the exception.

Article 81.—The King's Enemies.

This exception refers to the enemies of the sovereign of the shipowner (*a*). It probably only refers to states recognised as at war with the sovereign, and not to pirate or traitorous subjects (*b*), or to states at peace with the sovereign (*c*).

Note.—A few bills of lading add the exception “and/or the enemies of the ruler of the place the steamer may be in.” *Quære* whether the original exception also refers to the enemies of the sovereign of the shipper. Probably not, for: (1) The shipowner would hardly need to stipulate for protection against what would be a vice of the goods themselves (*d*): (2) As the Declaration of Paris protects enemies' goods in neutral vessels, it is not probable that such an exception would have much application, as the shipper's enemy could not delay the neutral ship, while if the goods were contraband, the vice in the goods themselves would free the shipowner from liability.

Case 1.—*F.*, merchants in Russia, shipped wheat in a ship belonging to *A.*, a subject of the Duke of Mecklenburg, to be carried to England under a bill of lading containing an exception “the King's enemies.” The Duke was at war with Denmark, and the ship was captured by the Danes. *Held*, that the exception certainly included enemies of the shipowner's sovereign, and the shipowner was therefore freed (*e*).

Case 2.—*F.* shipped goods under a bill of lading, excepting “the Queen's enemies.” Ship and goods were confiscated by the Spanish Courts for violations of the revenue laws, Spain being at peace with England. *Held*, that such confiscation did not come within the exception (*f*).

(*a*) *Russell v. Niemann* (1844), 17 C. B. N. S. 163.

(*b*) See the *Marshal of Marshalsea's Case*, and comments thereon, Holmes' Common Law, pp. 177, 201: *Forward v. Pittard* (1785), 1 T. R. 27, *per* Lord Mansfield, p. 34.

(*c*) *Spence v. Chodwick* (1847), 10 Q. B. 517.

(*d*) See *per* Willes, J., *arguendo*, in *Russell v. Niemann*, *ubi supra*, at p. 171.

(*e*) *Russell v. Niemann* (1864), 17 C. B. N. S. 163.

(*f*) *Spence v. Chodwick*, *v. s.* It would be a “seizure” under an insurance policy: *Cory v. Burr* (1883), 8 App. C. at p. 405.

Article 82.—Arrests or Restraints of Princes, Rulers, and Peoples (g).

This exception applies to forcible interferences by a State or the government of a country taking possession of the goods by a strong hand, such as arrest, embargoes (*h*), or blockades (*i*); to the operation of the common law as to trading with the enemy upon the outbreak of war (*k*); to government action for other purposes, indirectly resulting in the detention of the goods (*l*); to State prohibition of discharge, either temporarily, as in quarantine, or permanently, as where a cargo becomes tainted, and so within a prohibition against import (*m*); to the decrees of a Prize Court after capture (*n*); or to embargoes imposed by the government of the shipowner (*o*); or to the risk of such proceedings (*p*). A shipowner can rely on "restraint of princes" when the power of restraint operates only against his person, and though his ship is beyond the region where the restraining power can deal with her (*q*).

It does not apply to ordinary legal proceedings in the courts of a state with their result (*r*), to the ordinary operation of the local law at a port of call, known to the

(g) "Revolutions, riots, or émeutes" are occasionally added.

(h) *Rotch v. Edie* (1795), 6 T. R. 413.

(i) *Geipel v. Smith* (1872), L. R. 7 Q. B. 404.

(k) *British & For. Co. v. Sanday*, (1916) 1 A. C. 650.

(l) *Rodocanachi v. Elliott* (1874), L. R. 9 C. P. 518. It may protect the shipowner from the consequences of detention, e.g., when the detention of the ship caused a growth of barnacles; *Smith v. Rosario Co.* (1893), 2 Q. B., at p. 328.

(m) *Miller v. Law Accident Ins. Co.*, (1903) 1 K. B. 712 (C. A.). Cf. *British & For. Co. v. Sanday*, *ubi supra*.

(n) *Stringer v. English & Scottish Marine Ins. Co.* (1870), L. R. 5 Q. B. 599.

(o) *Aubert v. Gray* (1861), 3 B. & S. 163.

(p) *Nobel's Explosives v. Jenkins*, (1896) 2 Q. B. 326; *Phosphate Co. v. Rankin* (1915), 21 Com. Cas. 248. As to the amount of risk necessary, compare *Miller v. Law Accident Ins. Co.* (*supra*) with *Brunner v. Webster* (1900), 5 Com. Cases, 167.

(q) *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, (1917) 2 K. B. 873.

(r) *Finlay v. Liverpool & G. W. Co.* (1870), 23 L. T. 251; *Crew, Widgery & Co. v. G. W. Steamship Co.*, W. N. (1887) 161.

shipowner at the time the goods were shipped (*s*), nor to the proceedings of a number of people not professing to act legally or by government authority (*t*). It does not apply to restrictions on navigation as to sea routes imposed by a belligerent for the safety of shipping, to action taken to avoid the risk of loss by restraint of princes (*u*), nor to the threats of an arbitrary belligerent which suggest danger to neutral ships (*x*). Nor does it apply where the seizure of the ship results from the negligence of the shipowner or his agents in taking on board cargo of such a description as occasions the seizure (*y*). The exception may apply to matters preventing the cargo from arriving at the port of loading (*z*).

Case 1.—Goods were insured (*a*) from Japan to London *via* Marseilles and/or Southampton, by a line of steamers whose practice was to send goods by land from Marseilles to Boulogne *via* Paris. One of the risks insured against was “arrests, restraints, and detainments of all kings, princes, and peoples.” On arriving at Paris the goods were detained by the siege of Paris by the Germans, though not by any express order dealing with the goods. *Held*, a peril insured against (*b*).

Case 2.—A ship chartered to load nitrate at Iquique, with an exception of “restraints of princes and rulers, political disturbances or impediments, during the said voyage always mutually excepted,” was detained: (1) by civil war at the port of loading preventing loading; (2) by civil war preventing cargo coming down to such port; (3) by seizure by one faction to compel payment of export dues already paid to the other faction. *Held*, that all three causes were within the exception (*c*).

Case 3.—*F.* shipped goods under bill of lading excepting “acts or restraints of princes or rulers.” The goods were detained by an order of the state of New York in a civil action. *Held*, not to come within the exception (*d*).

(*s*) *Ciampa v. British India Co.*, (1915) 2 K. B. 774.

(*t*) *Nesbitt v. Lushington* (1792), 4 T. R. 783.

(*u*) *Becker Gray v. London Assurance Co.*, (1918) A. C. 101.

(*x*) *Bolckow, Vaughan & Co. v. Compania Minera* (1916), 32 T. L. R. 404. (*y*) *Dunn v. Currie*, (1902) 2 K. B. 614.

(*z*) *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174; Article 42.

(*a*) We have used insurance cases, as illustrations, when the different principles of construction do not affect the case.

(*b*) *Rodocanachi v. Elliott* (1874), L. R. 9 C. P. 518.

(*c*) *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174; see Article 42.

(*d*) *Finlay v. Liverpool & G. W. Co.* (1870), 23 L. T. 251; *Crew, Widgery & Co. v. G. W. Steamship Co.*, W. N. (1887) 161.

Case 4.—Goods were insured against “arrests, restraints, and detainment of all kings, princes and peoples.” The vessel was seized by a tumultuous mob, and the goods taken out of her. *Held*, not within the perils insured against, as “peoples” mean “the governing power of the country” (e).

Case 5.—Goods were shipped from London to Japan on a bill of lading excepting “restraint of princes.” They were contraband of war. On arrival at Hong Kong war broke out between China and Japan, and there was well-founded fear of capture if the ship proceeded. *Held*, that delivery in Japan was prevented by a restraint of princes within the exception (f).

Case 6.—A cargo of cattle on a voyage from London to Buenos Ayres became infected with disease during the voyage, and their landing was thereupon prohibited by an administrative order issued under the ordinary law of the Argentine Republic. *Held*, to be a restraint of princes (g).

Case 7.—A cargo of rice was shipped from Rangoon to Galatz. While on the voyage, an official of the Roumanian Government informed the agents of the ship that the law of Roumania prohibited the landing of rice from Rangoon. Thereupon the ship did not proceed to Galatz. In fact, there was no such prohibition in the law of Roumania. *Held*, the shipowners were not protected by the exception “restraint of princes” (h).

Case 8.—Cargo was insured by British assured on a British steamer to Hamburg. The insured perils included restraints of princes. War with Germany broke out during the voyage. The ship put into a British port and discharged the cargo. The assured gave notice of abandonment to the cargo underwriters. *Held*, that there was a constructive total loss by restraint of princes (i).

Case 9.—A Swedish ship was chartered to British charterers for six months, to perform voyages within certain limits. The charter contained an exception of “restraint of princes.” During the period the ship was at Cardiff, and was ordered by the charterers to load for Genoa, which was within the said limits. The shipowners refused to go on the ground that a new Swedish law had forbidden Swedish ships to carry goods for freight except to or from Swedish ports, and relied on the exception. Under the law the owner and master were liable to penalties for its breach. *Held*, that, though the Swedish Government were not in a

(e) *Nesbitt v. Lushington* (1792), 4 T. R. 783. This would be a “seizure.” See *Note, post.* p. 250. •

(f) *Nobel's Co. v. Jenkins*, (1896), 2 Q. B. 326. See, however, *Watts, Watts & Co. v. Mitsui*, (1916) 2 K. B. 826; (1917) A. C. 227, on anticipation that a peril will operate, as distinguished from anticipation as to the duration of a peril in operation. And see Case 10.

(g) *Miller v. Law Accident Ins. Co.*, (1903) 1 K. B. 712.

(h) *Brunner v. Webster* (1900), 5 Com. Cases, 167.

(i) *British & For. Co. v. Sanday*, (1916) 1 A. C. 650.

position to interfere with the ship, the shipowner was entitled to rely on the exception (k).

Case 10.—A German ship, insured against restraint of princes, and bound from Calcutta to Hamburg, was at sea when on August 4, 1914, war broke out between England and Germany. The master, to avoid risk of capture, put into a neutral port, where the voyage was abandoned. If the ship had proceeded she would probably have been captured. *Held*, the loss of voyage was not caused by restraint of princes, but by the voluntary act of the captain (l).

Note.—The phrase, "capture and seizure," common in insurance policies, rarely, if ever, occurs in bills of lading. The two words have been defined in *Cory v. Burr* (m) thus: "Capture" includes every act of seizing or taking by an enemy or belligerent, whether in reprisals or war; thus where a vessel was sunk by the Russians in the attempt to detain her before war had broken out, it was held a "capture" (n).

"Seizure" includes every act of taking forcible possession, either by a lawful authority or by overpowering force, whether such seizure be justified by law or not, or whether it be belligerent or not: thus a seizure of a ship by coolie passengers was held a "seizure" (o).

The difference, therefore, between the three exceptions is this:—

"*The King's Enemies*" covers belligerent acts of states, other than that of the owner of the vessel.

"*Restraints of princes or rulers*" includes this, and also covers restraints of the sovereign power in peace, whether of the carrier's country or not, other than the ordinary consequences of legal proceedings (p).

"*Capture and seizure*" includes all captures or seizures resulting from the above sources, and also all seizures resulting from ordinary legal proceedings or from private overwhelming force.

(k) *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, (1917) 2 K. B. 873.

(l) *Becker, Gray & Co. v. London Assurance*, (1918) A. C. 110.

(m) (1883), 8 App. C. at p. 405.

(n) *Powell v. Hyde* (1855), 5 E. & B. 607; *Tonnevold v. Finn Friis*, (1916) 2 K. B. 551.

(o) *Kleinwort v. Shephard* (1859), 1 E. & E. 447. See also *Johnston v. Hogg* (1883), 10 Q. B. D. 432; *Ionides v. Universal Marine Ins. Co.* (1863), 14 C. B. N. S. 259.

(p) The "restraint of princes" in *Miller v. Law Accident Ins. Co.*, *supra*, was held by the C. A. also to be a "detention," within the words "capture, seizure, and detention."

Article 83.—Perils of the Sea.

The term "Perils of the Sea" (*q*), whether in policies of insurance, charterparties, or bills of lading, has the same meaning (*r*), and includes:—

Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure (*r*). If a *prima facie* case of loss by perils of the sea is made, it is for the goods owner to disprove it by proving negligence causing the loss (*s*).

Such damage will include all natural and necessary consequences of perils of the sea (*t*), but not consequences which do not necessarily and immediately follow from

(*q*) This exception is usually expanded into "all and every other dangers and accidents of the seas, rivers and [steam] navigation of whatsoever nature and kind excepted." Before the cases in the House of Lords (note (*r*) below), the words "*and navigation*" had some wider meaning than "perils of the sea." It had been held in *Woodley v. Michell* (1883), 11 Q. B. D. 47, that a collision caused by negligence of the other ship was not a peril of the sea; but it was further held in *S.S. Garston Co. v. Hickie, Borman & Co.* (1886), 18 Q. B. D. 17, that such a collision was a peril of navigation. It was, however, decided by the House of Lords, overruling *Woodley v. Michell*, that damage by sea-water caused by such a collision is a peril of the sea, and the words "and navigation" appear meaningless: *The Xantho* (1887), 12 App. C. 503.

(*r*) Collected from the judgments in *Thames and Mersey Ins. Co. v. Hamilton* (1887), 12 App. C. 484; *The Xantho*, *ibid.* 503; *Hamilton v. Pandorf*, *ibid.* 518. No attempt is made in the Marine Insurance Act, 1906, to define "perils of the seas." Rule 7 in the First Schedule merely says:—"The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." The question whether loss or damage by the incursion of sea-water when a ship is intentionally scuttled by her crew constitutes loss by "perils of the seas" has lately been debated. Scrutton, L.J., held that it does not; *Samuel v. Motor Union*, (1922) 28 Conn. Cas. 134, and *Graham v. Merchants Co.*, (1922) *ibid.* 151. The other members of the C. A. decided these cases on other grounds, and in view of the decision in *Small v. United Kingdom Co.* (1897), 2 Q. B. 311, expressed no opinion on the point.

(*s*) *The Glendarroch*, (1894) P. 226.

(*t*) *Cf. Montoya v. London Assurance Co.* (1851), 6 Ex. at p. 458; *Jackson v. Union Marine Ins. Co.* (1874), L. R. 10 C. P. 125.

the occurrence of such perils, such as deterioration of goods by reason of delay caused by sea perils (*u*).

The shipowner will be liable for incidents that must occur on the voyage, such as taking the ground in the ordinary course of navigation (*x*), and for perils which, though occurring on the sea, are not peculiar to the sea, or to a ship on the sea, such as rats eating the cargo (*y*), and damage done by explosion of boilers, or bursting of steam valves (*z*), or damage to the ship by cargo being dropped upon it in loading (*a*).

Note.—As so defined, “perils of the sea,” which are not the same as perils on the sea (*b*), will include those “acts of God” where the effective cause is one peculiar to the sea. Thus frost or lightning (*c*), as effective causes of loss, will be acts of God, but not perils of the sea; damage by swordfish or icebergs would be a peril of the sea, if the shipowner could not have prevented it by reasonable care. There are *dicta* in the judgments of the House of Lords which suggest that the limitation in the definition, “peculiar to the sea,” is too narrow; *e.g.*, *per* Lord Halsbury (12 App. C. at p. 523): “Some effect must be given to the words, ‘perils of the sea’; the sea, or the vessel being on the sea, has nothing to do with” (a rat’s eating cargo in the hold of a ship); and again, *per* Lord Bramwell (p. 492): “The damage to the donkey-engine was not through it being in a ship or at sea”—“all perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such,” a wider phrase which Lord Herschell also uses (p. 498): “damage of a character to which a marine

(*u*) *Taylor v. Dunbar* (1869), L. R. 4 C. P. 206; *Pink v. Fleming* (1890), 25 Q. B. D. 396. *Cf.* *Field S.S. Co. v. Burr*, (1899), 1 Q. B. 579 (C. A.).

(*x*) *Vide post*, p. 254.

(*y*) *Laveroni v. Drury* (1852), 8 Ex. 166; *Kay v. Wheeler* (1867), L. R. 2 C. P. 302; *Hamilton v. Pandorf* (1887), 12 App. C. 518.

(*z*) *Thames and Mersey Ins. Co. v. Hamilton* (1887), 12 App. C. 484; *overruling West Indian Co. v. Home and Colonial Ins. Co.* (1881), 6 Q. B. D. 51.

(*a*) *Stott v. Marten*, (1916) 1 A. C. 304.

(*b*) *Per* Lord Herschell in *The Xantho* (1887), 12 App. C. 509. See the similar remark as to “perils of the roads,” by Parke, B., in *De Rothschild v. R. M. Steam Packet Co.* (1852), 7 Ex. at p. 743.

(*c*) The suggestion, *arguendo*, by Pollock, C.B., in *Lloyd v. General Coll. Co.* (1864), 3 H. & C. at p. 290, that lightning is a peril of the sea, is, it is submitted, erroneous.

adventure is subject." But these *dicta* again must be limited by the result of the decisions, as when Lord Halsbury says (p. 491), that "sea perils cannot be enlarged into perils whose only connexion with the sea is that they arise from machinery which gives motive power to ships." Perhaps the phrase "peculiar to the sea, or to a ship at sea," is most consistent with the authorities, and we have therefore adopted it.

Some previous definitions must clearly be revised. That by Lush, J.: "Casualties arising from the violent action of the elements as distinguished from their silent natural gradual action" (d) must be altered by substituting for "violent," "unexpected," or "out of the ordinary course of the adventure." For a ship running on a sunken rock in calm weather does not suffer from the violent action of the elements, but does incur a loss by perils of the sea. Again, the definition by Lopes, L.J., in *Pandorf v. Hamilton* (e): "Sea-damage occurring at sea and nobody's fault," is clearly not exhaustive. Sea-damage, through the fault of somebody (*e.g.* another ship), will be a peril of the sea both under a policy of insurance and a contract of affreightment, though by reason of implied undertakings the shipowner, in the case of negligence of the crew, may not be protected under a charter. And it is not clear what sea-damage it is which does not occur at sea.

The exception includes:—

- (1.) Damage by sea-water, whether it enters the ship through negligence of another ship in collision (f), or through holes made by rats (g), or worms (h), or swordfish, or icebergs, or cannon shot (i), or

(d) *Merchant Trading Co. v. Universal Marine Co.* (1874), L. R. 9 Q. B. 596. Cf. *Sassoon v. Western Assurance Co.*, (1912) A. C. 561.

(e) 16 Q. B. D. at p. 663; approved by Lord Bramwell (12 App. C. at pp. 492, 526) and Lord Macnaghten (12 App. C. p. 531).

(f) *The Xantho* (1887), 12 App. C. 503, overruling *Woodley v. Michell* (1883), 11 Q. B. D. 47. Cf. *Butler v. Fisher* (1800), 2 Peake, 183.

(g) *Hamilton v. Pandorf* (1887), 12 App. C. 518.

(h) Cf. *Rohl v. Parr* (1796), 1 Esp. 445.

(i) *Cullen v. Butler* (1816), 5 M. & S. 461, as corrected by Lord Herschell, 12 App. C. 509. But this would be a war risk rather than a marine risk: *Leyland v. Norwich Union*, (1918) A. C. 350. It seems that the fortuitous entry of sea-water is *prima facie* a peril of the sea, though, if it could have been prevented by due care of the shipowner and his servants, the shipowner is not, in the absence of a negligence clause, excused by such a peril of the sea. The intentional admission of sea-water, as in scuttling by the crew, is, it is submitted, not a "peril of the sea." See *Samuel v. Motor Union*, (1922) 28 Com. Cas.

- through some obstruction getting into a seacock so as to prevent its being closed (*k*).
- (2.) Damage to the goods by rough weather beyond the ordinary wear and tear of the voyage, the stowage not being negligent (*l*).
 - (3.) Captures by pirates (*m*) or wreckers (*n*).
 - (4.) Damage received while in dock without negligence, if the docking is in the course of the voyage (*o*); but not if the docking is not in pursuance of a voyage: as where the ship was blown over in a graving dock by a squall (*p*).
 - (5.) Stranding not incurred as part of the navigation, unless the shipper proves negligence (*q*). Thus damage through taking the ground in the ordinary course of navigation in a tidal harbour, or hauling up on the beach to repair, will not be a peril of the sea (*r*). But it will be a peril of the sea, if owing to stress of weather something different from the ordinary course of navigation occurs without negligence: as where a heavy swell bumps the ship on a hard bottom (*s*), or where damage is caused in the ordinary course of navigation by an unseen peril, which could not have been detected by reasonable care, as where a ship takes the ground over an unknown hole and strains herself (*t*), or where a

134. *Cf. Davidson v. Burnand* (1868), L. R. 4 C. P. 117. *The Cressington*, (1891), P. 152; *Blackburn v. Liverpool Co.*, (1902) 1 K. B. 290, where there was a negligence clause, and the engineer negligently let water into the wrong tank. The goods owner must prove negligence: *The Glendarrock*, (1894) P. 226.

(*k*) *M'Fadden v. Blue Star Line*, (1905) 1 K. B. 697.

(*l*) *Lawrence v. Aberdeen* (1821), 5 B. & A. 107; *Gabay v. Lloyd* (1825), 3 B. & C. 793; *The Catherine Chalmers* (1875), 32 L. T. 847. This covers damage through exceptionally rough weather preventing the ventilators being used for an unusual time, whereby the heat from the boilers damaged the cargo: *The Thrunscoc*, (1897) P. 301.

(*m*) *Pickering v. Barkley* (1648), Styles, 132. See Article 85, *infra*.
 (*n*) *Bondrett v. Hentigg* (1816), Holt, N. P. 149. *Quære*, if this accords with the principle of later decisions?

(*o*) *Laurie v. Douglas* (1846), 15 M. & W. 746; but compare *The Accomac* (1890), 15 P. D. 208; and *Devaux v. J'Anson* (1839), 5 Bing. N. C. 519, as criticised by Lord Herschell, 12 App. C. 497.

(*p*) *Phillips v. Barber* (1821), 5 B. & Ald. 161.

(*q*) *The Norway* (1864), B. & E. 404.

(*r*) *Magnus v. Buttemer* (1852), 11 C. B. 876; *Thompson v. Whitmore* (1810), 3 Taunt. 227.

(*s*) *Fletcher v. Inglis* (1819), 2 B. & A. 315. *Cf. Bishop v. Pentland* (1827), 7 B. & C. 219, where a rope broke and the ship fell on her side.

(*t*) *Letchford v. Oldham* (1880), 5 Q. B. D. 538. See also *Rayner v. Godmond* (1821), 5 B. & A. 225.

vessel is driven by stress of weather into a tidal harbour where she takes the ground (*u*).

The exception* will not include:—

- (1.) Damage by sea-water entering the vessel solely through the operation of natural causes, as by the ordinary decay or wear and tear of the vessel (*x*).
- (2.) Damage resulting from the ordinary wear and tear of the voyage which must be provided against by proper packing by the shipper, proper stowage by the shipowner.
- (3.) Damage arising from inherent inability of the cargo to stand the effects of the voyage (*y*).
- (4.) Any cases where the damage can be proved by the goods owner to result from negligence on the part of the shipowner or his servants in the stowage or management of the vessel (*z*).
- (5.) Damage resulting from original unseaworthiness of the vessel (*a*).
- (6.) Damage from war (*b*).
- (7.) Damage from confiscation by foreign Courts, or the consequences of actions at law (*c*).
- (8.) Barratrous acts of the crew (*d*), or intentional scuttling (*e*).
- (9.) Damage done directly by rats, or vermin, to the cargo (*f*).

The exception "collision" in bills of lading, which also excepts "perils of the sea," was formerly held to protect the shipowner from damage caused by the negligence of another

(*u*) *Corcoran v. Gurney* (1853), 1 E. & B. 456. Cf. *Barrow v. Bell* (1825), 4 B. & C. 736.

(*x*) *Sassoon v. Western Assurance Co.*, (1912) A. C. 561.

(*y*) *The Barcore*, (1896), P. 294 (deals changing colour after shipment in the wet).

(*z*) *The Glendarroch*, (1894) P. 226. Per Lord Herschell, *The Xantho*, 12 App. C. 510; *The Oquendo* (1878), 38 L. T. 151; *The Freedom* (1871), L. R. 3 P. C. 594; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106.

(*a*) *The Glenfruin* (1885), 10 P. D. 103, and see Article 29.

(*b*) *The Patria* (1871), L. R. 3 A. & E. 436.

(*c*) *Spence v. Chodwick* (1847), 10 Q. B. 517; *Benson v. Duncan* (1849), 3 Ex. 644.

(*d*) *The Chasca* (1875), L. R. 4 A. & E. 446.

(*e*) *Samuel v. Motor Union*, (1922) 28 Com. Cas. 134. See footnote (*r*) on p. 251, *supra*.

(*f*) *Kay v. Wheeler* (1867), L. R. 2 C. P. 302; *Laveroni v. Drury* (1852), 8 Ex. 166. Cf. *Hamilton v. Pandorf* (1887), 12 App. C. 518; *Dale v. Hall* (1750), 1 Wils. 281, has decided that "rats" are not the "act of God," on which see note (*z*), p. 245.

ship, for which he otherwise would have been held liable, on the authority of *Woodley v. Michell* (g). Now that *Woodley v. Michell* has been overruled in *The Xantho* (h), and a collision, unless caused by negligence of the shipowner's servants, is a peril of the sea, the exception "collision" appears almost meaningless.

Case 1.—Goods were lost through a collision with another ship, neither vessel being to blame. *Held*, that such a collision was a peril of the seas (i).

Case 2.—Goods were damaged through a collision caused by the negligence of the carrying ship. *Held*, not a peril of the seas (k).

Case 3.—Goods were damaged by a collision caused by the negligence of the other ship, winds and waves not contributing. *Held*, a peril of the seas (l).

Case 4.—Cattle were insured against perils of the sea; they were properly stowed, but the violence of the weather killed some and bruised others. *Held*, damage by perils of the seas (m).

Case 5.—Goods shipped were stowed in a place especially exposed to the waves, and in rough weather were damaged by salt water. *Held*, that the improper stowage took the damage out of the exception (n).

Case 6.—Owing to bad weather a ship's hatches were kept closed, and the cargo putrefied. *Held*, that improper stowage and lack of ventilation took the case out of the exception "perils of the seas" (o).

(g) *Woodley v. Michell* (1883), 11 Q. B. D. 47. When the other ship is negligent, her owner will be liable to the shipper in an action of tort; and the fact that her owner is also the owner of the carrying ship, and protected by the exceptions in the bill of lading, will not help him: *Chartered Bank v. Netherlands Co.* (1883), 10 Q. B. D. 521.

(h) (1887), 12 App. C. 503

(i) *Buller v. Fisher* (1800), 2 Peake, 188.

(k) *Lloyd v. General Colliery Co.* (1864), 3 H. & C. 284.

(l) *The Xantho* (1887), 12 App. C. 503, overruling *Woodley v. Michell* (1883), 11 Q. B. D. 47. The decision of the C. A. in *S.S. Garston v. Hickie, Borman* (1886), 18 Q. B. D. 17, that such a collision is a peril of navigation is now unnecessary.

(m) *Lawrence v. Aberdeen* (1821), 5 B. & A. 107; see also *Tatham v. Hodgson* (1796), 6 T. R. 656.

(n) *The Oquendo* (1878), 38 L. T. 151; see also *The Catherine Chalmers* (1875), 32 L. T. 847.

(o) *The Freedom* (1871), L. R. 3 P. C. 594, 603; see also *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106. Where goods properly stowed putrefy through extraordinary delay caused by bad weather, *semble*, that the shipowner will not be excused by the exception "perils of the sea"; though he may be by the plea of inherent vice in the goods themselves: *The Barcore*, (1896), P. 294. Such damage would not be a peril of the sea, for which underwriters would be liable; see *Taylor v. Dunbar* (1869), L. R. 4 C. P. 206; *Tatham v. Hodgson, v. s.; Pink v. Fleming* (1890), 25 Q. B. D. 396.

Case 7.—Goods were shipped with an exception “all and every the dangers and accidents of the seas and navigation.” While the ship was discharging her cargo in dock, moored to a barge and a lighter, she capsized, owing to ropes breaking, and the goods were damaged. *Held*, a “danger of navigation” within the exception (*p*).

Case 8.—Goods were damaged by sea-water let into the hold by the barratrous act of the crew in boring holes in the ship. *Held*, not a loss by perils of the sea (*q*).

Case 9.—Goods were damaged on the voyage by rats. The shipowner, who had two cats and a mongoose on board, and had employed a professional rat-catcher, was found to have taken every precaution. *Held*, that such damage by rats was not a peril of the sea or of navigation (*r*).

Case 10.—On a voyage rats ate a hole in a leaden pipe, and so let sea-water into the ship, damaging the cargo. *Held*, a peril of the sea (*s*).

Case 11.—A ship was fired into in mistake for an enemy, and sea-water entered through the shot-holes. Damage done by such sea-water is a peril of the sea (*t*).

Case 12.—A donkey engine accidentally exploded: *Submitted*, that if the explosion damaged goods directly, such damage would not be a peril of the sea; but that if it admitted sea-water to the goods, the damage in that case would be a peril of the sea (*u*).

Article 84.—Strikes.

A “strike” is “a general concerted refusal by workmen to work in consequence of an alleged grievance” (*x*).

(*p*) *Laurie v. Douglas* (1846), 15 M. & W. 746; see *The Accomac* (1890), 15 P. D. 208; cf. *Devauz v. J'Anson* (1839), 5 Bing. N. C. 519, as criticised by Lord Herschell, 12 App. C. 497.

(*q*) *The Chasca* (1875), L. R. 4 A. & E. 446.

(*r*) *Kay v. Wheeler* (1867), L. R. 2 C. P. 302. Cf. Godolphin, “A view of the Admiralty Jurisdiction,” 1685: “The master . . . may not sail without one cat or more in his vessel.” So Malynes, *Lex Mercatoria* (1686), p. 102: The master “must answer for any harm which Rats do in a Ship to any Merchandise for want of a Cat.” So earlier in a charterparty of “the *Anne of Hull*” of June 10, 1532, it is provided that the shipowner shall supply “a doge and a cat with all other necessaryes.” Marsden, *Select Pleas of the Admiralty Court* (Selden Society, 1892), Vol. I., p. 37.

(*s*) *Hamilton v. Pandorf* (1887), 12 App. C. 518.

(*t*) *Cullen v. Butler* (1816), 5 M. & S. 461, as corrected by Lord Herschell, 12 App. C. 509. See *Leyland v. Norwich Union*, (1918) A. C. 350, as to war risk.

(*u*) *Thames Ins. Co. v. Hamilton; The Inchmaree* (1887), 12 App. C. 484; *Hamilton v. Pandorf*, *v. s.*

(*x*) *Per Sankey, J., Williams v. Naamlooze, &c.* (1915), 21 Com. Cas. at p. 257. The “grievance” in that case was the crew’s objection to

The exception "strikes or lock-outs" covers refusals of men or masters to carry on work or business by reason of and incidental to labour disputes (y). It does not cover dismissals of men to save expense (z) or men leaving work for fear of disease (a).

The employer must use reasonable exertions to carry on his business and obtain men (b). Strikes preventing cargo from coming to the port of loading may be within the exception (c). An exception of "strike preventing loading" will not entitle the charterer to decline to load by reason of a strike of the crew which may delay the ships's sailing (d).

An exception of "strikes," expressed to be mutually operative, will not absolve the charterer from paying hire

face the dangers of German mines and submarines. The suggestion in *Stephens v. Harris* (1887), 56 L. J. Q. B. 516, that the grievance must be as to the rate of wages, is too narrow; *ibid*.

(y) *Richardson v. Samuel*, (1898), 1 Q. B. 261, at pp. 267, 268. As to the phrase "general strike," see *Aktieselskabet Shakespeare v. Ekman* (1902), 18 Times L. R. 605. In *Re Allison and Richards* (1904), 20 Times L. R. 584, it was held that delay through colliers taking an unauthorised holiday was within the exception, "time lost through strikes, lock-outs, or any other cause beyond the charterers' control." In *Gordon Co. v. Moxey* (1913), 18 Common Cas. 170, it was held that "stoppage" of work by a strike may extend beyond the actual ending of the strike, e.g., where colliers cannot in fact resume the getting of coal for some days after they are willing to resume work. But "stoppage" in such a clause means an entire absence of output, and not merely a deficiency, however great: *Aktieselskabet Adalands v. Whitaker* (1913), 18 Com. Cas. 229. See also *Arden S.S. Co. v. Mathwin*, (1912) Sess. Cas. 211. Where a ship moored end on to a quay was not discharged owing to a declaration of the Presidents of two Co-operative Societies of labour (published some months before and since acted on) that vessels were not to be discharged while so moored, the delay was held not to be within an exception of "hands striking work": *Horsley Line v. Roeckling* (Sc. (1908), Sess. Cas. 866). As to an exception of "strike of any class of workmen essential to the discharge," see *Langham S.S. Co. v. Gallagher* (1911), 2 Ir. Rep. 348; and *Dampskibsselskabet Svendborg v. Love* (1915), Sess. Cas. 543.

(z) *Richardson v. Samuel*, *vide supra*.

(a) *Stephens v. Harris* (1887), 56 L. J. Q. B. 516. Cf. also *Mudie v. Strick* (1909), 14 Com. Cas. 137.

(b) *Bulman v. Fenwick*, (1894) 1 Q. B. at p. 185. A charterer cannot rely on delay from a strike, if by having made a proper contract with the suppliers of the cargo the delay could have been avoided: *Dampskibsselskabet Danmark v. Poulsen* (1913), Sess. Cas. 1043.

(c) *The Alne Holme*, (1893) P. 173. See also *Leonis Co. v. Rank* (No. 2) (1908), 13 Com. Cas. 161, 295.

(d) *Ropner v. Ronnebeck* (1914), 20 Com. Cas. 95.

for time during which he has been prevented by a strike from employing the ship (*e*).

Article 85.—Pirates (f), Robbers by Land or Sea, Thieves.

Piracy is "robbery and depredation on the sea or navigable rivers, etc., or by descent from the sea upon the coast, by persons not holding a commission from an established civilised state" (*g*).

The exception "robbers" refers to robbers by violence external to the ship (*h*), and does not include secret theft (*i*).

The exception "thieves" refers to thieves external to the ship (*i*).

Thefts or mutinous seizure by the crew, if reasonable precautions have been taken to prevent them, are probably barratry.

Case 1.—A box of diamonds was shipped with the exceptions, "pirates, robbers, thieves, barratry of master and mariners." The box was stolen before delivery; there was no evidence to show by whom. *Held*, that thieves meant "thieves external to the ship." That even if theft by the crew was barratry, still as the shipowners must prove the loss to fall within one of the exceptions (*k*) (and it might have been the act of a passenger,

(*e*) *Brown v. Turner Brightman*, (1912) A. C. 12; *cf.* *Aktieselskabet Lina v. Turnbull* (1907), Sess. Cas. 507.

(*f*) An Act of 1670 (22-23 Car. II. cap. 11) imposed penalties on the masters and crews of any ships of 200 tons, and mounting 16 guns and upwards, which shall be surrendered to Pirates or Sea Rovers without fighting. There were similar provisions in 1700 by 11-12 Will. III. Cap. 7 § 10, 11.

(*g*) The definition of the New English Dictionary. See *Republic of Bolivia v. Indemnity*, (1909) 1 K. B. 785.

(*h*) *De Rothschild v. Royal Mail Co.* (1852), 7 Ex. 734. The phrase "assailing thieves" is sometimes used.

(*i*) *Taylor v. Liverpool S.S. Co.* (1874), L. R. 9 Q. B. 546. *Cf.* *The Prinz Heinrich* (1897), 14 Times L. R. 48. Rule 9 of Schedule 1 of the Marine Insurance Act, 1906, reads, "The term 'thieves' does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers."

(*k*) *Semble*, that if the shipowner had proved theft by the crew, *i.e.*, *prima facie* barratry, the *onus* of proving negligence of the owner or master would then be on the shipper.

who was certainly not within the exceptions), the shipowner was liable (l).

Case 2.—Goods were shipped from P. to London, under exceptions, “robbers, the dangers of the seas, roads, and rivers.” The goods were stolen in transit by rail from Southampton to London. *Held*, that “robbers” meant robbers by violence, and the shipowner was liable (h).

Case 3.—Goods were shipped under exceptions . . . “pirates, robbers, or thieves of whatever kind, whether on board or not, by land or sea.” Goods were stolen after shipment by one of the stevedore’s men employed by the ship. *Held*, the exception did not apply to thefts committed by men in the service of the ship (m).

Note.—Loss by pirates has been held a peril of the sea (n), and if this is still the law the advantage of the additional exception “pirates” is not very great. It, however, relieves the shipowner of the burden of proving that the loss was not caused by his negligence (o). Mutinous seizure by the passengers has been held “piracy” under an insurance policy (p).

The cases above are sometimes met by such exceptions as “thieves, whether on board or not,” “pilferage,” or “plunder of goods by crew or stevedores.” Many bills of lading, however, adopt the cases by inserting the exception, “thieves by land or sea, but not pilferage.”

In ships which usually carry bullion in a bullion room, there is an implied warranty that the bullion room is reasonably fit to resist thieves: unless this is complied with, the ship is unseaworthy (q).

Article 86.—Loss or Damage from Leakage (r), Breakage, Heat, Sweat, Rust, etc.

If reasonable care is used in the stowage of goods, this exception protects the shipowner from liability for any

(l) *Taylor v. Liverpool S.S. Co.* (1874), L. R. 9 Q. B. 546.

(m) *Steinman v. Angier Line*, (1891) 1 Q. B. 619. Some of the large lines have now widened their exceptions to meet this.

(n) So decided as long ago as 1648 in *Pickering v. Barclay* (Styles, 132), and in other old cases. *Quære* if the decision is consistent with modern definitions of perils of the sea (see Article 83, *supra*).

(o) *Czech v. General Steam Co.* (1867), L. R. 3 C. P. 14.

(p) *Palmer v. Naylor* (1854), 10 Exch. 382.

(q) *Queensland Bank v. P. & O. Co.*, (1898) 1 Q. B. 567.

(r) An attempt to limit “leakage” to “ordinary leakage,” said by the custom of trade to be one per cent., failed in *Ohrloff v. Briscall* (1866), 4 Moore, P. C. N. S. 70, 77.

damage or loss to the goods which leak, break, heat, sweat, rust, etc.

• It does not by itself protect him from liability for damage resulting from negligent stowage (s) (though it throws the burden of proving such negligence on the shipper) (t), nor the liability for damage to goods from the leakage, etc., of other goods (u).

Case 1.—Goods were shipped, “to be free of breakage, leakage, or damage.” On discharge the goods were found damaged by oil. There was no oil in the cargo, but oil was used in the donkey-engine in an adjacent part of the ship. *Held*, that the exception did not relieve the owner from liability for the negligence of his servants, but threw the burden of proving such negligence on the shipper (t).

Case 2.—Sugar was shipped “not liable for leakage.” It was damaged by leakage from other sugar which accumulated owing to insufficient means of drainage. *Held*, that the accumulation of leakage was the cause of the damage, and that the exception did not cover this (x).

Case 3.—Palm-baskets and barrels of oil were shipped “not accountable for rust, leakage, or breakage.” The oil leaked and damaged the palm-baskets. *Held*, the exception only covered the leakage of the oil, and not the damage to the baskets by such leakage (y).

Case 4.—Maize was shipped under a bill of lading containing *inter alia* exceptions of “loss or damage . . . arising from sweating . . . decay . . . heat.” The maize was damaged by becoming heated on the voyage, which was due to improper stowage. *Held*, that the shipowners were liable (z).

(s) *Philips v. Clark* (1857), 2 C. B. N. S. 156, see *per Willes*, J. See also *The Pearlmoor*, (1904) P. 286.

(t) *Czech v. General Steam Co.* (1867), L. R. 3 C. P. 14; *Craig v. Delargy* (1879), 6 Sc. Sess. Cases, 4th Ser. 1269; but see *The Glen-darroch*, (1894) P. 226.

(u) *The Nepoter* (1869), L. R. 2 A. & E. 375; *Thrift v. Youle* (1877), 2 C. P. D. 432. This source of liability is often met by an exception of “contact with or smell or evaporation or taint from other goods”; or “injurious effects from other goods.”

(x) *The Nepoter* (1869), L. R. 2 A. & E. 375. Case 3 shews that the exception did not cover the damage by leakage, even without accumulation.

(y) *Thrift v. Youle* (1877), 2 C. P. D. 432. So “rust” only covers rust of the goods themselves, not damage done by contact with other rusty goods: *Barrow v. Williams* (1890), 7 T. L. R. 37.

(z) *The Pearlmoor*, (1904) P. 286.

Article 87.—Fire.

By sect. 502 of the Merchant Shipping Act, 1894 (*a*), a shipowner is not liable for any loss of or damage to goods by reason of fire on board (*b*), if the loss happens without his actual fault or privity.

If a shipowner seeks to rely upon the protection of this section the onus is upon him to prove that the loss was without his fault or privity (*c*).

If the "shipowner" is a corporation the fault or privity must be that of its managing authority (*d*)—i.e. the board of directors of a company (*e*), or the managing owner (*f*).

The exemption under this section is not conditional upon the fulfilment of the implied warranty of seaworthiness (*g*). Therefore proof that the fire was caused by unseaworthiness will not deprive the shipowner of the statutory protection, as it would deprive him of the benefit of an exception of "fire" in his bill of lading.

A shipowner can contract himself out of the benefit of this section (*h*). Where therefore goods are shipped under a bill of lading which contains an exception of "fire," and which also contains an express or implied promise to be liable for loss due to unseaworthiness, the shipowner has been held to have agreed to be liable for loss or damage from fire caused by unseaworthiness, and thereby to have waived the benefit of the section (*i*).

(a) See Appendix III. p. 471.

(b) "Damage by reason of fire" includes damage by smoke and by water used to put out fire: *The Diamond*, (1906) P. 282.

(c) *Lennard's Co. v. Asiatic Co.*, (1915) A. C. 706. Cf. S. C. in C. A., (1914) 1 K. B. at pp. 432, 433, 436.

(d) "Of the person who is really the directing mind and will of the corporation, the very *ego* and centre of the personality of the corporation," *per* Haldane, L.C., *Lennard's Co. v. Asiatic Co.*, (1915) A. C. at p. 713.

(e) *Smitton v. Orient Co.* (1907), 12 Com Cas. 270; cf. *The Yarmouth* (1909), P. 293.

(f) *Lennard's Co. v. Asiatic Co.*, (1915) A. C. 706.

(g) *Virginia, &c. Co. v. Norfolk, &c. Co.*, (1912) 1 K. B. 229.

(h) Cf. *The Satanita*, (1897) A. C. 59.

(i) *Virginia, &c. Co. v. Norfolk, &c. Co.*, (1912) 1 K. B. 229.

But such an agreement will only be inferred from some special undertaking in the bill of lading to be liable for fire caused by unseaworthiness: it will not be inferred merely from (a) the insertion of "fire" as an excepted peril, and (b) the existence of the implied warranty of seaworthiness, in the bill of lading (*k*).

An exception of "fire" is very commonly inserted in bills of lading. In view of the provision of the statute this is unnecessary (*l*), and in some cases, as will be seen, its insertion actually increases the liabilities of the shipowner.

If a fire results from spontaneous combustion, due to the dangerous condition of the goods, of which the shipowner could not reasonably know, the statute or the exception "fire" will protect him, but shippers of other goods damaged will have their remedy against the shippers of the dangerous goods (*m*).

Fire caused by lightning will be an "act of God."

Article 88.—Barratry of Master or Mariners.

This exception covers any wilful act of wrong-doing by the master or mariners against the ship and goods without the privity of the shipowner, though with the intention of benefiting him. Barratry of the mariners includes any crime or fraud causing loss of or damage to

(*k*) *Ingram v. Services Maritimes*, (1914) 1 K. B. 541.

(*l*) The statute only deals with "fire on board." Cf. *Morewood v. Pollok* (1853), 1 E. & B. 743. Where a bill of lading covers goods elsewhere than on board (*e.g.*, in craft, or on quay during transhipment) an exception of "fire" may be desirable to supplement the protection of the statute. The danger to the shipowner of inserting the exception (as shown by the *Virginia Carolina* case (*ubi supra*)) may be avoided by adding a clause—"Nothing in this bill of lading shall be deemed in any way to limit or affect the operation of sect. 502 of the Merchant Shipping Act, 1894."

(*m*) See *ante*, Article 31. Neither the exception "fire on board," nor the provision of sect. 502 of the Merchant Shipping Act, relieves the shipowner from the liability for general average contribution to the owner of goods damaged by water used in extinguishing a fire on board: *Schmidt v. Royal Mail Co.* (1876), 45 L. J. Q. B. 646; *Greenshields v. Stephens*, (1908) App. Cas. 431.

the goods, committed by them under such circumstances that they could not reasonably have been prevented by the owner or the master (*n*).

Acts to the best of a man's judgment, though erroneous, or through honest incompetence, or illegal acts done by the owner's instructions, or acts whose commission has only been rendered possible by the owner's negligence in appointing a drunken or incapable captain (*o*), will not come under the exception "barratry" (*p*).

Negligence, even amounting to reckless carelessness, will not constitute barratry; there must be an intention to injure the ship or goods (*q*).

The following acts are barratrous:—

Boring holes in a ship to scuttle it (*r*); illegal trading with the enemy, or smuggling (*s*); intentional breach of port rules so that the ship is forfeited or detained (*t*); intentional breach of blockade without owner's authority (*u*); fraudulent deviations from course (*x*).

The following acts are not barratrous:—

Deviation, unless accompanied by fraud or crime (*y*);

(*n*) For the captain to deviate from his proper voyage for purposes of his own profit may constitute barratry: *Mentz Decker & Co. v. Maritime Co.* (1909), 15 Com. Cas. 17.

(*o*) See *per* Brett, L.J., 10 Q. B. D. at p. 532.

(*p*) Arnould on Marine Insurance, sects. 838-857; Lord Hardwicke, in *Lewen v. Suasso* there cited; Lord Ellenborough, in *Earle v. Rowcroft* (1806), 8 East. at p. 139; *Atkinson v. G. W. Insurance Co.* (1872), 27 L. T. 108 (Am.).

(*q*) Channell, J., *Briscoe v. Powell* (1905), 22 Times L. R. 128, at p. 130. The recklessness presumably may be so great as to be in itself evidence of intention. See the discussion of "wilful misconduct" in *Forder v. G. W. Railway*, (1905) 2 K. B. 532, and in *Smith v. G. W. Railway* (1922), 1 A. C. 178.

(*r*) *The Chasca* (1875), L. R. 4 A. & E. 446; *Ionides v. Pender* (1873), 27 L. T. 244.

(*s*) *Earle v. Rowcroft* (1806), 8 East, 126; *Havelock v. Hancill* (1789), 3 T. R. 277; *Pipon v. Cope* (1808), 1 Camp. 434.

(*t*) *Knight v. Cambridge*, cited 8 East, 135; *Robertson v. Ewer* (1786), 1 T. R. 127.

(*u*) *Goldschmidt v. Whitmore* (1811), 3 Taunt. 506.

(*x*) *Ross v. Hunter* (1790), 4 T. R. 33; *Mentz Decker & Co. v. Maritime Co.* (1909), 15 Com. Cas. 17.

(*y*) *Earle v. Rowcroft*, *vide supra*; *Phyn v. Royal Exchange Co.* (1798), 7 T. R. 505.

failure to observe rules of navigation, without fraud, though such failure is by statute to be taken as wilful default (z); stowing goods on deck, in spite of shipper's remonstrance (a).

Article 89.—Negligence of the Master, Mariners, and other Servants of the Shipowner (b).

The tendency of the Courts is to construe this and similar exceptions strongly against the shipowner (c); they will not protect him from the consequences of his own personal negligence (d), as in negligently appointing a drunken or incompetent captain, or in negligently giving orders that no pilot should be employed (e).

But where the master is himself owner or part owner, and is sued as such, the exception "negligence of the master" will protect him as to his negligence as master, though not as to his negligence as owner (f).

(z) *Grill v. General Colliery Co.* (1866), L. R. 1 C. P. 600, at p. 610.

(a) *Atkinson v. G. W. Insurance Co. (Am.)* (1872), 27 L. T. 103.

(b) This exception assumes various forms. See Note 3 at the end of this article.

(c) *Price v. Union Lighterage Co.*, (1904) 1 K. B. 412; *The Pearl-moor*, (1904) P. 286. Cf. footnote (k), *supra*, p. 96, and cases there cited. See also Note 2 at the end of this article. Cf. also *Rosin, &c. Co. v. Jacobs* (1909), 14 Com. Cas. 78. In the last case the principle was recognised, but the decision reversed by the C. A. and H. L. (14 Com. Cas. 247, 15 Com. Cas. 111). So where a charter for live-stock excepted negligence and unseaworthiness in a general exceptions clause, and in another part it was provided that the ship should provide water for the cattle, it was held by Mathew, J., that the exceptions did not operate to excuse a failure to fulfil the positive agreement to provide water: *Vallée v. Bucknall* (1900), 16 T. L. R. 362. But an exception limiting liability beyond a certain amount may apply although the loss is caused by negligence: *Baxter's Co. v. Royal Mail Co.*, (1908) 2 K. B. 626.

(d) For a case where the shipowner was held personally liable for negligence, see *City of Lincoln v. Smith*, (1904) A. C. 250. For a case that failed, *Anglo-Argentine Co. v. Westoll*, (1904) A. C. at p. 255. (Reported also *The Times*, May 15, 1900.)

(e) *Per Brett, L.J.*, 10 Q. B. D. 532; *Norman v. Binnington* (1890), 25 Q. B. D. at p. 477. See also *Worms v. Storey* (1855), 11 Ex. at p. 430 (repairs); *Grill v. General Colliery Co.* (1868), L. R. 1 C. P. 600; 3 C. P. 476 at p. 481 (navigation); *Laurie v. Douglas* (1846), 15 M. & W. 746 (management of cargo): discussed in *Notara v. Henderson* (1872), L. R. 7 Q. B. at p. 236; and *The Accomac* (1890), 15 P. D at p. 211.

(f) *Westport Coal Co. v. Macphail*, (1898) 2 Q. B. 130.

This exception will not apply, unless clearly worded to that effect, to relieve the shipowner from the consequences of a breach of his implied undertaking (*g*) that the ship should be seaworthy at starting (*h*).

Where an exception of negligence of the shipowner's servants is clearly expressed, full effect will be given to it, so that even the most culpable recklessness on their part will not render him liable (*i*).

Case 1.—Cargo was shipped under an exception, "negligence or default of master or mariners or others performing their duties." Through careless stowage by master and crew the cargo was damaged. *Held*, the exception freed the shipowner from liability (*k*). *Submitted*, that it would not have done so, if the stowage had made the ship unseaworthy at starting (*l*).

Case 2.—Sugar was shipped under an exception of "loss from any act, neglect, or default of the pilot, master, or mariners in navigating the ship" . . . "the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper and the ship, shall be considered the agents of the shipper." The sugar was negligently stowed. *Held*, by Denman, J., that the damage did not occur "in navigating the ship"; by the Court of Appeal that the damage, resulting from the act of the stevedore, was not within the exception (*m*).

(*g*) *Steel v. State Line Co.* (1878), 3 App. C. 72; and Article 29.

(*h*) See Article 29, *supra*. See also *The Glenfruin* (1885), 10 P. D. 103; where, though "accidents to machinery" were excepted in the bill of lading, loss caused by the breaking of a crankshaft through a latent flaw, not discoverable by diligence on the part of the shipowner, was held not within the exception: *Tattersall v. National Steam Ship Co.* (1884), 12 Q. B. D. 297; and *Lewu v. Dudgeon* (1867), L. R. 3 C. P. 17, note; where cattle were shipped under a bill of lading containing the exception, "the owners will not be liable for any loss arising from suffocation or other causes to cattle." Cattle were lost through suffocation, resulting from the ship's capsizing through insufficient ballast being provided, through owner's negligence. *Held*, that this prevented the exception from applying. So an exception of "neglect . . . of stevedores or servants . . . in loading, stowing, or otherwise," was held not to protect the shipowner where bad stowage constituted unseaworthiness: *Ingram v. Services Maritimes*, (1913) 1 K. B. 538. See also *Paterson Zochonis v. Elder Dempster*, (1923) 1 K. B. 420. But see *The Thorsa*, (1916) P. 257.

(*i*) *Briscoe v. Powell* (1905), 22 Times L. R. 128. *Cf. The Torbryan*, (1903), P. 35, 194. So in *Marriott v. Yeoward*, (1909) 2 K. B. 987, it was held that even felonious acts by a servant of the shipowner were covered by "any act, neglect, or default, whatsoever" of servants, &c.

(*k*) See note (*h*), ante.

(*l*) *The Duero* (1869), L. R. 2 A. & E. 393.

(*m*) *Hayn v. Culliford* (1878), 3 C. P. D. 410; 4 C. P. D. 182. *Cf. The Ferro*, (1893) P. 38, where the words were "navigation or manage-

Case 3.—A ship was chartered to proceed to X., and there load sugar, the shipowners not to be responsible "for any act, neglect, or default, whatsoever of their servants during the said voyage." During the loading one of the engineers negligently left open a valve, whereby water entered and damaged the cargo. *Held*, that "voyage" included the whole time during which the vessel was performing the contract contained in the charter, and that the exceptions exempted the shipowner from liability (n).

Case 4.—Cargo was carried under an exception of "any act, negligence, or default of master or crew in the navigation of the ship in the ordinary course of the voyage." In discharging cargo in dock, through the removal of a bilge-pump, water entered the hold, and damaged the cargo. *Held*, by Butt, J., that the damage was caused by joint negligence of an engineer and shore workmen, and was not within the exception; *Held*, by the C. A., that, assuming there was negligence of the crew, it was not in navigating the ship, or in the ordinary course of the voyage, and the exceptions did not apply (o).

Case 5.—Cargo was carried under an exception of "negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise." The goods were damaged while the ship was being loaded, by negligence of the shipowner's men. *Held*, that the exception protected the shipowner from liability (p).

Case 6.—A cargo was shipped under the exceptions, "perils of the sea . . . and other accidents of navigation even when occasioned by the negligence of the master." On the voyage a leak was caused by perils of the sea, through which water entered; the master negligently omitted to stop the leak, whereby water continued to enter. *Held*, the exceptions freed the shipowner from liability (q).

Note 1.—*Onus of Proof.*—If when loss or damage has occurred the goods-owner proves facts as to the cause of the

ment," and the stevedore's negligent stowage was held not to come within them on both of the grounds taken in *Hayn v. Culliford*. The expression "loss by negligence of servants" has been held to protect the shipowner from a claim by the cargo-owner, where the goods were by the negligence of his servants delivered to the wrong consignee: *Smackman v. General Steam Co.* (1907), 13 Com. Cas. 196.

(n) *The Carron Park* (1890), 15 P. D. 203.

(o) *The Accomac* (1890), 15 P. D. 208; doubting *Laurie v. Douglas* (1846), 15 M. & W. 746. For a Scotch decision on similar words, see *Gilroy v. Price* (1891), 18 Sc. Sess. C. 569.

(p) *Norman v. Binnington* (1890), 25 Q. B. D. 475; see *Baerelman v. Bailey*, (1895), 2 Q. B. 301; where one passage at the end of the judgment in *Norman v. Binnington* is disapproved; see also *De Clermont v. General Steam Navigation Co.* (1891), 7 T. L. R. 187, and *Packwood v. Union Castle Co.* (1903), 20 Times L. R. 59.

(q) *The Cressington*, (1891) P. 152; so if the sea-water was negligently admitted to the wrong tank by the engineer: *Blackburn v. Liverpool Co.*, (1902) 1 K. B. 290.

loss which are consistent with negligence on the part of the shipowner or his servants, but such evidence leaves it in doubt whether the actual cause of the loss or damage was such negligence, the onus is upon the shipowner to prove that the loss was not due to negligence (r).

Note 2.—Upon the question whether general words do, or do not, protect a contractor from liability for negligence there have been two lines of cases,—the railway cases and the ship cases. Unfortunately the one set has not always been sufficiently cited and considered in the argument and decision of the other set, with the result that there has been, if not an actual divergence of principle in the two, at any rate a consistency that can only be supported by drawing a line that may well be invisible to the layman. This divergence was acutely realised and the line in all its fineness drawn in *Travers v. Cooper* (s). The result is that the words, “not responsible for damage capable of being covered by insurance,” do not protect the shipowner from liability for negligence, while the words, “not responsible for damage, however caused, which is capable of being covered by insurance,” do so protect him. The reason given is that the latter words direct attention to causation, and the former do not.

Note 3.—The original form of this exception was “loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew.” But “default” was held not to free the shipowner from actual negligence of his servants. It now takes various forms; e.g. “act, neglect, or default of the pilot, master, or mariners, or other servants of the shipowner”; engineers, stokers, and stevedores are sometimes expressly included; and the exception sometimes also covers “any person for whose conduct the owners would otherwise be responsible, whether on board this or any other vessel”; or “on any other ship belonging to or chartered by the company” (t). The exception sometimes applies to “navigation,” sometimes to “navigation and management,” or “navigation in the ordinary course of the voyage,” or “navigation or otherwise”; or “providing, dispatching, or navigating the ship or otherwise”; or “whether such neglect do occur before or

(r) *Travers v. Cooper*, (1915) 1 K. B. 73; cf. *L. N. W. R. v. Ashton*, (1920) A. C. 84. Contrast *Smith v. G. W. R.*, (1922) 27 Com. Cas. 247.

(s) (1915) 1 K. B. 73. Cf. *Pyman v. Hull and Barnsley Co.*, (1915) 2 K. B. 729.

(t) To meet *Chartered Bank v. Netherlands Co.* (1883), 10 Q. B. D 521.

during the voyage, or at the port of discharge." This form of clause is frequently combined with the exception expressly negating the implied undertaking of seaworthiness (*u*). It sometimes concludes, "it being agreed that the captain, officers, and crew in transmission of the goods, as between shipper, owner, and consignee thereof, and shipowners, are to be considered servants of such shipper, owner, or consignee." The following clause has been used as a compromise, viz. "strandings and collisions and all losses occasioned thereby are excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, or mariners and other servants of the shipowner, but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo caused by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports."

Note 4.—Much discussion has taken place on the question whether the words "navigation" and "voyage" constantly found in this exception merely apply to the actual sailing of the ship from port to port, or are wider and cover all acts done in pursuance of the cargo-carrying adventure from the reception of the goods till their discharge; and also on the words "navigation" and "management" in section 3 of the Harter Act (*x*). The authorities are not in a very satisfactory condition. It seems that the exceptions in the contract of affreightment, unless otherwise worded, limit the shipowner's liability during the whole time in which he is in possession of the goods as carrier (*y*). Accordingly an exception of negligence "during the voyage" was held by Sir J. Hannen to cover negligence during loading, and to apply to the whole time during which the vessel was engaged in performing the contract contained in the charter (*z*). and an exception of "damage in navigating the ship, or otherwise," was held to cover damage done during loading (*a*). So also in club policies of insurance. In *Good v. London*

(*u*) *Vide ante*, Note to Article 29.

(*x*) Appendix V.

(*y*) *Norman v. Binnington* (1890), 25 Q. B. D. at p. 478; *The Carron Park* (1890), 15 P. D. 203; per Wright, J., in *De Clermont v. General Steam Navigation Co.* (1891), 7 T. L. R. at p. 188.

(*z*) *The Carron Park*, *v. s.*

(*a*) *Norman v. Binnington*, *v. s.* Cf. *The Glenochil*, (1896), P. 10, in which an exception "faults in management" was held to cover putting water into the ballast tanks while the cargo was being discharged without ascertaining that the pipes were in order. See also *Blackburn v. Liverpool Co.*, (1902) 1 K. B. 290; and *The Rodney*, (1900) P. 112.

Mutual Association (b), leaving a sea-cock and bilge-cock open, whereby the water entered the hold, was held "improper navigation" within the policy; Willes, J., defining the phrase as "something improperly done with the ship or part of the ship in the course of the voyage." Being asked *arguendo* whether bad stowage would be improper navigation, Willes, J., said, "Certainly, unless in a port where stevedores are employed," the qualification being the point taken by the Court of Appeal in *Hayn v. Culliford* (c), while M. Smith, J., qualified this as "bad stowage which affects the safe sailing of the ship." In *Carmichael's Case* (d), a cargo of wheat was damaged through improper caulking of a cargo-port by the shipowner's servants before the voyage commenced: and it was held by the Court of Appeal that this was "improper navigation" within the policy. In *Canada Shipping Co. v. British Shipowners' Association* (e); a cargo of wheat was damaged by being stowed in a dirty hold, and this was held by the Court of Appeal not to be improper navigation. It hardly falls within the scope of this work to distinguish these cases on policies, and we are unable to do so. In *The Accomac* (f), where a pipe was left open through the joint negligence of the ship's engineer and shore workmen repairing the ship, whereby water entered and damaged the cargo, the C. A., while holding that the joint negligence took the case out of the exception, were also inclined to hold that this was neither "navigation" nor "in the ordinary course of the voyage," and they doubted the decision in *Laurie v. Douglas* (g), where the capsizing of a ship while moored in dock was held a danger of navigation. In *The Ferro* (h), Sir F. Jeune and Barnes, J., held under a bill of lading excepting "damage from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the vessel": (1) that the

(b) (1871), L. R. 6 C. P. 563. In *The Warkworth* (1884) (9 P. D. 20, 145), a negligent inspection of the steam-steering gear by an over-looker on shore, whereby the ship steered badly and did damage, was held "improper navigation" within sect. 54 of the Merchant Shipping Act, 1862 (now re-enacted by sect. 503 of the Merchant Shipping Act, 1894), which limits the owner's liability, and Bowen, L.J., defined it as "improper navigation by the owner of the ship or his agents, including using a ship which is not in a condition to be so employed."

(c) *Hayn v. Culliford* (1878), 3 C. P. D. 410; 4 C. P. D. 182.

(d) *Carmichael v. Liverpool S.S. Association* (1887), 19 Q. B. D. 242.

(e) (1889), 23 Q. B. D. 342.

(f) (1890), 15 P. D. 208.

(g) (1846), 15 M. & W. 746.

(h) (1893) P. 38.

stevedore's negligence was not covered; (2) that, if it was, improper stowage was not "navigation or management of the vessel." In *The Southgate* (i), where water entered through a valve improperly left open while the vessel was moored with cargo in her before starting, Barnes, J., seems to have thought that the accident was one of "navigation," while he decided that it was clearly an "accident of the sea and other waters"; and in *The Glenochil* (k), where the engineer, while the cargo was being discharged, pumped water into the ballast tank to secure stability, without inspecting the pipes, and the water through a broken pipe damaged the cargo, the Divisional Court held that this was in the "management," even if it was not in the "navigation" of the vessel. Both in *The Rodney* (l), where the boatswain in trying to get water out of the forecabin by freeing a pipe with a rod broke the pipe so that water got to the cargo; and in *Rowson v. Atlantic Transport Co.* (m), where meat was damaged by the negligent working of refrigerating machinery, the casualty was held to be a "fault in management." In *The Renée Hyafil* (n) the master stayed in a port of call from his fear of German submarines or mines, and the cargo was damaged by the delay; it is not surprising that the Court held that this was not "a fault or error in navigation or management." In *Owners of S.S. Lord v. Newsum* (o) an error of the master in choosing the route he should pursue was held not to be negligence, default, or error in judgment "in the management or navigation of the ship." In *Toyosaki v. Société des Affréteurs* (p) it was held that neglect by the master to give orders to keep steam up in port was not "negligence, default, or error in judgment of the master in the management of the steamer." It would seem that "navigation in the course of the voyage" cannot be extended beyond the actual sailing of the ship (though it is submitted on the whole course of the authorities that the better view would have been to consider the words as applicable to the

(i) (1893) P. 329.

(k) (1896) P. 10.

(l) (1900) P. 112.

(m) (1903) 2 K. B. 666. Some of the judges in treating it as a fault in management of the ship relied on the fact that the refrigerating machinery was used to cool the ship's provisions as well as the cargo. It is had only cooled the cargo the decision would apparently have been otherwise.

(n) (1916), 32 T. L. R. 660.

(o) (1920), 1 K. B. 846.

(p) (1922), 27 Com. Cas. 157.

whole adventure the shipowner undertakes, the management and conduct of his ship as a cargo-carrying vessel); but that "management," and perhaps "navigation" by itself, will extend to the whole of such adventure.

Note 5.—The exception, "at merchant's risk," in a clause for the benefit of the shipowner, has been held to cover any damage done by the negligence of the master or crew acting as agents of the shipowner, as in cases of improper jettison, or collision or stranding arising from negligence, but not to cover any damage done by master or crew acting in case of necessity as agents of the cargo-owner, as in a case of proper jettison, giving rise to a general average contribution (q).

Article 89A.—Railway Companies—Carriage by Sea—Negligence.

In previous editions of this book there has appeared in this Article an exposition of the position of English railway companies in regard to their power to insert an exception of negligence in bills of lading. That position was that railway companies incorporated before 1863 were as free as any other shipowner to insert such a clause, but railway companies incorporated after 1863 might not rely on such a clause unless (i) there was a special contract signed by the consignor, and (ii) a judge decided that the terms of the special contract were reasonable,—a provision that gave the opportunity for a mordant utterance by Bramwell, L.J. (r).

(q) *Burton v. English* (1883), 12 Q. B. D. 218. In *Wade v. Cockerline* (1904), 10 Com. Cas. 47, Kennedy, J., expressed the opinion that "at charterer's risk" would excuse the shipowner from a loss of deck cargo caused by negligent stowage. It was unnecessary to determine the point. See also *The Forfarshire*, (1908) P. 339, where the meaning of "at owner's risk" was construed in the light of other stipulations.

(r) "Here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business"; *M. S. & L. Co. v. Brown* (1883), 8 A. C. at p. 716. The question of reasonableness was a matter solely for the judge to determine, and not a question of fact for the jury (*G. W. R. Co. v. McCarthy* (1887), 12 A. C. 218, at pp. 229, 239), a decision which may be relevant on sect. 300 of the New Zealand "Shipping and Seamen Act, 1908."

This curious state of things arose from the existence of sect. 31 of the Railways Clauses Act of 1863 (*s*), which extended the provisions of sect. 7 of the Railway and Canal Traffic Act, 1854 (*t*) to steam vessels and the traffic carried thereby; and from the accident that in 1888 the Legislature, finding sect. 31 of the Act of 1863 and sect. 16 of the Regulation of Railways Act, 1868 (*u*), to be in identical terms, and desiring to repeal one of them as unnecessary, repealed the wrong one (*x*).

By sect. 56 and Schedule 6 of the Railways Act, 1921 (*y*), sect. 31 of the Act of 1863 is repealed. The result is that all the railways are now in the position hitherto enjoyed by those incorporated before 1863, *i.e.*, as free as any other shipowner to issue a bill of lading in any terms, and the former contents of this Article are now obsolete.

If a railway company charters a steamer, the position is the same as if the steamer belonged to the company (*z*).

The Railways Act, 1921 (*y*), has also altered the law in regard to the effect of the Carriers Act, 1830 (*b*). Hitherto when a railway company carried partly by land and partly by sea it could rely on the statutory exceptions in that Act as regards the land carriage only (*c*). By sect. 56 and Schedule 6 of the Act of 1921 the Carriers Act, 1830, in its application to railway companies, is to be treated as containing an added clause 11 whereby "common carrier by land" is to include "common carrier by water," and the Act is to apply to carriage by water in the same manner as it applies to carriage by land (*d*).

(*s*) 26 & 27 Vict. c. 92.

(*t*) 17 & 18 Vict. c. 31.

(*u*) 31 & 32 Vict. c. 119.

(*x*) By sect. 59 of 51 & 52 Vict. c. 25.

(*y*) 11 & 12 Geo. V. c. 55.

(*z*) See sect. 12 of the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78).

(*b*) 11 Geo. IV. & 1 Will. IV. c. 68.

(*c*) See *L. N. W. R. v. Ashton*, (1920) A. C. 84.

(*d*) The amount of £10 in sect. 1 and sect. 2 of the Carriers Act, 1830, is as regards the railway companies raised to £25, and the words about "silks" in sect. 1 are to be omitted.

Another statutory provision affecting railway companies carrying by sea may be noted, *viz.* sect. 14 of the Regulation of Railways Act, 1868 (*e*). By that it is provided that where a company contracts by through booking to carry partly by land and partly by sea, it may limit its liability for certain excepted perils (*f*) by a notice displayed in the booking office and printed on the receipt or freight note.

By sect. 54 (5) of the Railways Act, 1921 (*g*), where a railway company carries partly by land and partly by sea all the books, tables, and documents, which show their through rates are to contain all the rates charged for the sea traffic, and to state what proportion of a through rate applies to the conveyance by sea.

Article 90.—Jettison.

This exception will cover all claims made under the bill of lading and arising from the improper jettison of goods properly stowed; but will not cover claims arising out of the jettison of goods improperly stowed (*h*).

Submitted, that it will not cover any claims for a general average contribution arising from proper jettison of goods (*i*).

Article 91.—Operation of Exceptions.

Exceptions in the contract of affreightment, unless otherwise clearly worded, limit the shipowner's liability

(*e*) 31 & 32 Vict. c. 119.

(*f*) The act of God, King's enemies, fire, accidents from machinery, boilers and steam, and all other perils of the sea, &c.

(*g*) 11 & 12 Geo. V. c. 55.

(*h*) *Royal Exchange S. Co. v. Dixon* (1886), 12 App. C. 11; *Newall v. Royal Exchange Co.* (1885), 33 W. R. 342, 363. See also Article 110.

(*i*) On authority of *Schmidt v. Royal Mail Co.* (1876), 45 L. J. Q. B. 646; *Crooks v. Allan* (1879), 5 Q. B. D. 38.

during the whole time he is in possession of the goods as carrier, and therefore apply during the loading and discharging of the goods (*k*).

The arrival of the ship (*l*), coupled with failure to deliver the goods, is *prima facie* evidence of breach of contract (*m*), and, probably, of negligence (*n*), by the shipowner. The shipowner must shew that the cause of the loss was one of the excepted perils in the bill of lading, or that the goods were not shipped (*o*), in order to free himself (*m*).

If he makes a *prima facie* case to this effect, the shipper must then disprove it (*p*) by shewing that the real cause of the loss was something not covered by the exceptions, as, for instance, the negligence of the shipowner or his servants, where negligence is not one of the excepted

(*k*) *Norman v. Binnington* (1890), 25 Q. B. D. 475; *The Carron Park* (1890), 15 P. D. 203; per Wright, J., in *De Clermont v. General Steam Navigation Co.* (1891), 7 T. L. R. 187; and see Note 4 to Article 89, p. 269, *ante*.

(*l*) The non-arrival of the ship is not evidence of negligence at all: *Boyson v. Wilson* (1816), 1 Stark. 236.

(*m*) *The Xantho* (1886), 2 Times L. R. 704. Lord Herschell's remarks in 12 App. C. at p. 512, were not approved by the C. A. in *The Glendaroch*, (1894) P. 226. Where goods are delivered damaged, see, as to the burden of proof, Article 52.

(*n*) See *Baxter's Leather Co. v. Royal Mail Co.*, (1908) 1 K. B. 796; 2 K. B. 626. See also, as to onus of proof of negligence, Note 1 on p. 267. Proof of failure to deliver and nothing more does not establish "wilful misconduct" against the carrier: *Smith v. G. W. R.* (1922), 27 Com. Cas. 247.

(*o*) *Smith v. Bedouin Co.*, (1896) A. C. 70; *Harrowing v. Katz* (1894), 10 Times L. R. 400; affirmed by H. L., November 26, 1895 (see note in (1896) A. C. at p. 73); *Bennett v. Bacon* (1897), 2 Com. Cases, 102 (C. A.). In all these cases the shipowner could not produce any satisfactory evidence to displace the statement of shipment in the bill of lading; such evidence must shew not merely that the goods may not have been shipped, but that in fact they were not: (1896) A. C. at p. 79. If the bill of lading results from a tally it will be difficult to displace it; otherwise if the tally was disputed: *Hine v. Free* (1897), 2 Com. Cases, 149. But the shipowner may discharge the onus on him by sufficient evidence that nothing has been lost or stolen, and that he has delivered all that he received: *Sanday v. Strath S.S. Co.* (1920), 26 Com. Cas. 163, 277. See also Article 20 *supra*.

(*p*) As to the onus of proof, see *The Northumbria*, (1906) P. 292; *L. N. W. R. v. Ashton*, (1920) A. C. 84.

perils (*q*), or unseaworthiness (*r*), where unseaworthiness is not excepted, or that there has been a deviation (*s*); and unless he can prove one of these, the shipowner will be protected (*t*).

Exceptions in the bill of lading will not affect the rights and liabilities of shipper and shipowner as to general average contributions (*u*), unless they are clearly intended to do so (*x*).

Case 1.—Goods shipped under a bill of lading, excepting “perils of the sea,” were delivered damaged. The shippers sued, and the shipowners proved damage by sea-water through stranding. *Held*, that unless the shipper proved negligent navigation causing the stranding, the shipowner succeeded (*y*).

Case 2.—Goods were shipped, “to be free from leakage or damage.” On discharge the goods were found damaged by oil. There was no oil in the cargo, but oil was used in the donkey-engine in an adjacent part of the ship. *Held*, that the exception did not relieve the owner from liability for the negligence of his servants, but threw the burden of proving such negligence on the shipper (*z*).

(*q*) *The Glendarroch*, (1894), P. 226. *Cf. The Pearlmoor*, (1904), P. 286, where an exception “not liable for heating or for any other damage” was *held* not to protect the shipowner against heating caused by negligent stowage. But where the bill of lading provides for a limitation of the amount of liability it may avail the shipowner in case of a loss due to negligence, but not in case of one due to unseaworthiness: *Baxter's Leather Co. v. Royal Mail Co.*, (1908) 2 K. B. 626.

(*r*) See Article 29, and Article 79, Note 5, p. 243.

(*s*) See Article 99, *infra*.

(*t*) *The Norway* (1865), 3 Moore, P. C. N. S. 245; *Muddle v. Stride* (1840), 9 C. & P. 380; *Czech v. General Steam Co.* (1867), L. R. 3 C. P. 14. See also *Williams v. Dobbie* (1884), 11 Sc. Sess. Cases, 4th Ser. 982; *Cunningham v. Colvils* (1888), 16 Sc. Sess. Cases, 4th Ser. 295.

(*u*) *Schmidt v. Royal Mail S.S. Co.* (1876), 45 L. J. Q. B. 646; *Crooks v. Allan* (1879), 5 Q. B. D. 38.

(*x*) As in *Walford v. Galindez* (1897), 2 Com. Cases, 137. A clause negating contribution is not uncommon in Italian and Greek charters.

(*y*) *The Glendarroch*, (1894) P. 226.

(*z*) *Czech v. General Steam Co.* (1867), L. R. 3 C. P. 14; *Craig v. Delargy* (1879), 6 Sc. Sess. Cases, 4th Ser. 1269.

Article 92.—Who can sue for Failure to carry Goods safely.

I. *In tort*, there can sue:—

All who have any proprietary interest in the goods, whether or not they are parties to the bill of lading.

The consignee of goods will be deemed to have such a property unless the contrary appear (a).

The nominal shipper cannot sue in tort if he ships merely as agent for the real owner (b).

II. *In contract*, there can sue:—

(1) The shipper, unless he acted merely as agent for another, in which case the principal can sue (c), the agent cannot (b).

(2) Any person to whom by indorsement and delivery of the bill of lading, or by indorsement followed by delivery of the goods, the absolute property in the goods has passed (d).

(3) The consignee named in the bill of lading if the property has passed to him by such consignment (d).

Article 93.—Who can be sued (e) for Negligent Carriage of the Goods.

I. *The shipowner*.—(1) *In tort*, if he is or was in possession of the goods by his agents, there being no charter

(a) *Coleman v. Lambert* (1839), 5 M. & W. 502, at p. 505; *Tronson v. Dent* (1853), 8 Moore, P. C. 419. As to bailees, not liable over to their bailor, see *The Winkfield*, (1902) P. 42: in which case it is very doubtful whether the alleged bailee had possession at all.

(b) *Moore v. Hoppers* (1807), 2 B. & P. N. R. 411; *sed cf. The Winkfield*.

(c) *Anderson v. Clark* (1824), 2 Bing. 20; *Fragano v. Long* (1825), 4 B. & C. 219.

(d) Bills of Lading Act, 1855, s. 3, and Article 75. For cases before the Act on the ability of consignees to sue in contract, see *Tronson v. Dent* (1853), 8 Moore, P. C. 419; *Sargent v. Morris* (1820), 3 B. & A. 277.

(e) As to the Courts in which action can be brought, see Article 77, *supra*, and Section XIII. p. 436, *infra*.

amounting to a demise (*f*); (2) *in contract*, by any person with whom he has contracted, or by the assignees of such person.

II. *The charterer*.—(1) *In tort*, if he is or was in possession of the goods, his charter amounting to a demise (*f*); (2) *in contract*, by any person with whom he has contracted, or the assignees of such person.

III. *The master*.—(1) *In tort*, if he is or was in possession of the goods; (2) *in contract*, by any person to whom he has made himself personally liable on a contract (*g*).

The shipper or person entitled to sue can sue either the master, or the owner or charterer, but not both. If he has obtained judgment against the master, he cannot further sue the owner or charterer for the same cause (*h*).

(*f*) See Article 2; and *cf.* *Baumvöll v. Gilchrest*, (1893) A. C. 8.

(*g*) But apparently the master, if sued on a bill of lading signed by himself merely as agent for charterers, cannot be sued in contract: see *per* Bigham, J., in *Repetto v. Millars* (1901), 6 Com. Cas. at p. 135. "The master therefore could not be sued, and it follows as a consequence that he cannot sue."

(*h*) *Priestly v. Fernie* (1865), 3 H. & C. 977; *Leslie v. Wilson* (1821), 6 Moore, Ex. 415.

SECTION VII.

THE PERFORMANCE OF THE CONTRACT.—THE VOYAGE.

Article 94.—“ Final Sailing ” (a).

A VESSEL has finally sailed when she has left her port of loading (or her last port of call in the United Kingdom) (b), ready for her voyage, with the purpose of proceeding on her voyage, and without any intention of coming back (c).

The fact that she is towed and has no sail set, or that she is driven back into port by a storm, will not prevent her having “ finally sailed ” (c). But if her clearances are not on board, or she is not ready for sea, the fact that she has left the port will not constitute final sailing (d).

The term “ port ” is to be taken in its business, popular, and commercial sense (c), and not in its legal definition for revenue or pilotage purposes (e).

(a) Whether a vessel has “ finally sailed ” may be of importance as to the payment of “ advance freight.” See Case 1 *infra*.

(b) “ Sailing ” in insurance cases, where there is a warranty to sail before a particular day, has been held to be “ breaking ground,” i.e. leaving her moorings ready for sea, though not leaving port; see Parke, B., in *Roelandts v. Harrison* (1854), 9 Ex. at p. 456; Arnould, sects. 647—653. See also *Mersey Mutual v. Poland* (1910), 15 Com. Cas. 205.

(c) *Price v. Livingstone* (1882), 9 Q. B. D. 679; *Roelandts v. Harrison* (1854), 9 Ex. 444; *S.S. Garston v. Hickie* (1885), 15 Q. B. D. 580; approved by Lord Watson in *Hukter v. Northern Ins. Co.* (1888), 13 App. C. at p. 733; *Leonis Co. v. Rank*, (1908) 1 K. B. at pp. 519 *et seq.*; *Hall Bros v. Paul* (1914), 19 Com. Cas. 384. “ Port ” may mean a usual place of loading within a legal port: *Caffin v. Aldridge*, (1895) 2 Q. B. 648 (C. A.); see also *The Mary Thomas* (1896), 12 T. L. R. 511.

(d) *Thompson v. Gillespy* (1885), 5 E. & B. 209; *Hudson v. Bilton* (1856), 6 E. & B. 565.

(e) On the other hand, in *Caffarini v. Walker* (1876), 10 Ir. L. R. C. L. 250, and *M'Intosh v. Sinclair* (1877), 11 Ir. Rep. C. L. 456, the “ port of Newry ” was taken in its legal and fiscal sense, and not as a geographical expression. On the distinction see also *Nicholson v.*

"*Port Charges*" include all charges a vessel has to pay before she leaves a port, and therefore light dues, where such are claimable (*f*), but the term does not include pilotage dues (*g*).

Case 1.—A ship was chartered, the owners to receive one-third of the freight within eight days "from final sailing from her last port in the United Kingdom." She was loaded at Penarth, and towed out eight miles, bringing her three miles into the Bristol Channel, outside the commercial, but inside the fiscal port of Cardiff. She then cast anchor, owing to threatening weather. A storm arose, which drove her ashore within the commercial port of Cardiff. *Held*, that she had finally sailed from her last port, so as to entitle her owners to an advance of one-third of the freight (*h*).

Case 2.—A ship being loaded and cleared, came into the roads and cast anchor three miles from X. harbour, not intending to return. The shrouds and cables were not ready for sailing, bills of lading were not signed, and the mate was not on board. She was lost the same day, before the deficiencies were supplied. *Held*, she had not finally sailed (*i*).

Article 95.—Master's Authority on the Voyage.

The master on a voyage occupies a double position: he has the duty on behalf of the shipowners, of doing what is necessary to carry out the contract (*k*), and of taking

Williams (1871), L. R. 6 Q. B. 632. In *Nielsen v. Wait* (1885), 14 Q. B. D. 516, the "port of Gloucester" seems to be taken as the legal or fiscal port. In *S.S. Garston v. Hickie*, *vide supra*, Brett, M.R., says, "the port may extend beyond the place of loading and unloading; if the port authorities are exercising authority over ships within a certain space of water, and shipowners are submitting to that jurisdiction, that is the strongest evidence that that space of water is accepted as the commercial port." *Cf. Goodbody v. Balfour* (1899), 5 Com. Cases, 59, as to the port of Manchester.

(*f*) *Newman v. Lamport*, (1896) 1 Q. B. 20.

(*g*) *Whittall v. Rahtkens* (1907), 12 Com. Cas. 226. *Cf. Societa Ungherese v. Hamburg S. A. Ges.* (1912), 17 Com. Cas. 216. As to "dock dues," see *The Katherine* (1913), 30 T. L. R. 52.

(*h*) *Price v. Livingstone* (1882), 9 Q. B. D. 679. In *Roelandts v. Harrison, v. s.*, and *S.S. Garston v. Hickie* (1885), 15 Q. B. D. 580, the port was also the port of Cardiff, the ship in each case was ready to sail, and on her way to sea, but had not got outside the commercial port.

(*i*) *Thompson v. Gillespy* (1855), 5 E. & B. 209; see also *Hudson v. Bilton* (1856), 6 E. & B. 565.

(*k*) *The Turgot* (1886), 11 P. D. 21; *The Beeswing* (1885), 53 L. T. 554.

reasonable care of the goods entrusted to him, his first duty to the goods owner being to carry on the cargo safely in the same bottom (*l*), and he has also, if extraordinary steps are necessary, such as sale (*m*), borrowing money on bottomry (*n*), salvage agreements (*o*), transshipment (*p*), jettison (*q*), deviation or delay (*r*), the power to bind his owners, if such steps are shewn to be necessary, and if there was no possibility of communication with his owners.

He can also bind the charterer by his actions in doing what is necessary on the charterer's part to carry out the contract, but not beyond, unless by express instructions (*s*).

Thus the captain is the agent of the owners in providing those necessities for the voyage which by the terms of the charter are to be paid for by the owners, or necessities for the ship's sailing where it is in the interest of the owners that the ship should sail (*t*); he is the agent of the charterers for providing those necessities for the voyage which are by the charter to be paid for by the charterers, *e.g.* coal (*u*); but in this case he is agent of the shipowners to see that the steamer starts with a sufficient supply of coal and is thus seaworthy. *Cf. McIver v. Tate Steamers* (*x*) and *The Vortigern* (*y*).

(*l*) *The Hamburg* (1864), B. & L. 253, see p. 272; *The Gratitude* (1801), 3 C. Rob. 240; *Notara v. Henderson* (1872), L. R. 7 Q. B. 225; *Assicurazioni v. Bessie Morris S.S. Co.*, (1892) 2 Q. B. 652 (C. A.), *et post*, Article 101.

(*m*) See *Australasian Steam Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222; and Articles 102, 104.

(*n*) See *The Karnak* (1869), L. R. 2 P. C. 505, and Articles 105, 106, *post*.

(*o*) *The Renpor* (1883), 8 P. D. 115, and Article 121.

(*p*) *The Soblomsten* (1866), L. R. 1 A. & E. 293, and Article 103.

(*q*) *Burton v. English* (1883), 12 Q. B. D. 218, and Article 107.

(*r*) See Articles 99, 100.

(*s*) *The Turgot* (1886), 11 P. D. 21; *The Beeswing* (1885), 53 L. T. 554.

(*t*) Thus where the owners were to receive time freight, and the ship was detained through failure of the charterers to supply coal as per charter, it was held that the master had no authority to bind the owners by his orders for coal, as the owners gained nothing by expediting the sailing of the ship: *The Turgot* (1886), 11 P. D. 21. See also *Citizens Bank v. Wendlin* (1886), 2 Times L. R. 240.

(*u*) *The Beeswing* (1885), 53 L. T. 554; *Morgan v. Castlegate S.S. Co.*, (1893) A. C. 38.

(*x*) (1903) 1 K. B. 362.

(*y*) (1899) P. 140.

The duty of protecting the interests of the cargo owner may devolve upon the master, from his possession of the goods (*z*); in this case, if his action was necessary, and there was no possibility of communication with the cargo owner, the action of the master will bind the cargo owner (*a*), as in salvage agreements (*b*), sale (*c*), borrowing money on *respondentia* (*d*), transshipment (*e*), drying or conditioning goods (*f*), jettison (*g*), delay or deviation (*h*). The master is always the appointed agent for the ship: he is in special cases of necessity the involuntary agent for the cargo owner; but the foundation of his authority is the prospect (*h*) of benefit, direct or indirect, to the cargo owner. Thus he may sell part of the cargo to carry on the rest, but may not sell the whole cargo unless it cannot profitably be carried further. He may not repair the ship at the sole expense of the cargo without reasonable prospect of benefit to such cargo, and such a prospect would not exist in the case of goods not injured by delay (*i*).

Article 96.—Master's Authority, whence derived.

The authority of the master, in the absence of express instructions, to deal with the ship and goods in a manner not consistent with the ordinary carrying out of the con-

(*z*) Cf. *Hansen v. Dunn* (1906), 11 Com. Cas. 100.

(*a*) *The Gratitude* (1801), 3 C. Rob. 240, and see Articles 96, 97, 98.

(*b*) *The Renpor* (1883), 8 P. D. 115, and Article 121.

(*c*) See *Australasian Steam Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222, and Articles 102, 104. See also *Sims v. M. R. Co.*, (1913) 1 K. B. 103.

(*d*) *The Onward* (1873), L. R. 4 A. & E. 38; *Kleinwort v. Cassa Marittima* (1877), 2 App. C. 156, and Articles 104–106.

(*e*) *The Soblomsten* (1866), L. R. 1 A. & E. 293, and Article 103.

(*f*) Article 101.

(*g*) *Burton v. English* (1883), 12 Q. B. D. 218, and Article 107.

(*h*) The fact that the cargo ultimately derives no benefit is immaterial, if there was a reasonable prospect of it: *Benson v. Chapman* (1848), 2 H. L. C. 696, at p. 720.

(*i*) *The Onward, v. s.*, at pp. 57, 58; see also *per Brett, M.R.*, and *Bowen, L.J.*, in *The Pontida* (1884), 9 P. D. at p. 180; *The Gratitude* (1801), 3 C. Rob. at pp. 257, 261.

tract, as by selling the goods, throwing them overboard, or pledging them for advances of money, depends on two circumstances:-

1. The necessity for the action: (Art. 97).

2. The impossibility of communicating with his principals, whether goods-owners or shipowners: (Art. 98).

Article 97.—Necessity.

Action will be *necessary* if it is apparently the best course for a prudent man to take in the interests of the adventure (*k*). The mere fact that the master acts in good faith is not sufficient (*l*).

Thus, if money can be obtained from the shipowner's or cargo owner's agent in the port, or raised on personal credit, the master will not be justified in binding the ship or cargo by a bottomry bond; but there will be necessity for such a course of action if the carriage of the cargo cannot be completed with profit to the cargo owner, without raising money on security of the cargo (*m*).

So, also, if damaged wool can either be sold as it is, or can be dried, repacked, and sent on, but at a cost to the owner clearly exceeding any possible value of it when so treated, the commercial necessity for the sale will arise; but if the goods can be carried on and delivered in a merchantable state, though damaged, the master will not be justified in selling (*n*).

Where such a necessity of dealing with the cargo arises, the captain in dealing with the cargo acts as the agent of the cargo owner (*o*); if no such necessity exists (*p*), or if the necessity arises from wrongful acts or omissions on the part

(*k*) *The Onward*, L. R. 4 A. & E. 38, at p. 58; *Atlantic Insurance Co. v. Huth* (1880), L. R. 16 Ch. D. 474, at p. 481. Cf. *Phelps, James & Co. v. Hill*, (1891) 1 Q. B. 605.

(*l*) *Tronson v. Dent* (1853), 8 Moore, P. C. at p. 448 *et seq.*; the owner may be liable for an erroneous, though *bonâ fide*, use of the master's discretion; *Epwbank v. Nutting* (1849), 7 C. B. 797.

(*m*) *The Onward*, *vide supra*.

(*n*) Articles 102—104.

(*o*) *Burton v. English* (1883), 12 Q. B. D. 218.

(*p*) As in the case of improper jettison or sale.

of the shipowner (*q*), or if the captain professes to act for the shipowner (*r*), he will be treated as the agent of the shipowner (*s*).

Article 98.—Communication with Owners.

The master, before dealing with the cargo in a manner not contemplated in the contract must, if possible (*t*), communicate with the owners of the cargo as to what should be done. For the master's authority to bind the cargo owners rests upon the fact that the circumstances require immediate action in the interests of the cargo, and that nobody but the master can decide what shall be done in time to take such immediate action. If the cargo owners can be communicated with and can give directions in time, the necessity for the master's action does not arise (*u*).

The possibility of communication must be estimated by consideration of the facts rendering immediate action necessary, the distance of the master from the cargo owners, and his means of communicating with them, the cost and risk incidental to the delay resulting from the

(*q*) As in the case of jettison resulting from improper stowage on deck : *Newall v. Royal Exchange S. Co.* (1885), 33 W. R. 342, 868.

(*r*) As in cases of transhipment, in which the captain does not abandon the shipowner's voyage and forward the goods in the interests of the cargo owner, but continues the voyage in another ship in the interests of the shipowner and to earn freight for him. *Cf. Hansen v. Dunn* (1906), 11 Com. Cas. 100.

(*s*) *Newall v. Royal Exchange S. Co.*, *vide supra*.

(*t*) Such communication is practically impossible in the cases of jettison and salvage agreements at sea.

(*u*) *The Hamburg* (1863), 2 Moore, P. C. N. S. at p. 323, explaining *The Bonaparte* (1853), 8 Moore, P. C. 459. For the German law, see *The August*, (1891) P. 323. The above passage deals with the question of action to be taken by the captain in the interests of the cargo and as agent for the cargo owners. But where the captain is dealing with the cargo in the interests of the shipowner (*e.g.*, where the ship has been damaged and it is a question whether to repair her and complete the voyage), the absence of instructions from the cargo owners will not absolve the shipowner from liability for neglect causing damage to the cargo while his own course of action is being considered. See *Hansen v. Dunn* (1906), 11 Com. Cas. 100.

attempt to make such communication, and the probability of failure after every exertion has been made (x).

The necessity for communication with cargo owners will be much lessened in cases where the action of the master primarily affects the ship, as in repairs of the ship, or deviations by necessity, causing delay, or where, the ship being a general one, there are many owners of cargo (y).

Such communication need only be made where an answer can be obtained from the cargo owners, or there is reasonable expectation that it can be obtained, before it becomes necessary to take action. If there are reasonable grounds for such an expectation, the master should use every means in his power to obtain such an answer. He is bound to employ the telegraph where it can be usefully employed, but the state and management of the particular telegraph, and the probability of correct transmission of messages by it, are all to be considered (z).

The information furnished must be full, and must include a statement of any measure, such as sale, raising money on bottomry, etc., which the master proposes to take (a).

If the master communicates and receives instructions, he is bound to follow them, if consistent with his duty to the shipowner; if he communicates and receives no instructions he may take such action as appears necessary (b); if he can communicate and does not do so, he

(x) *The Karnak* (1869), L. R. 2 P. C. at p. 513; *The Onward* (1873), L. R. 4 A. & E. 38.

(y) *Phelps, James & Co. v. Hill*, (1891) 1 Q. B. 605. If this case lays down that it is never necessary to communicate with cargo owners where steps are to be taken, affecting their cargo, and inconsistent with the contract, it is submitted it goes too far. The authorities in this article do not seem to have been cited to the Court.

(z) *Australasian Steam Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222.

(a) *The Onward* (1873), L. R. 4 A. & E. 38; *Kleinwort v. Cassa Marittima* (1877), 2 App. C. 156.

(b) *The Karnak* (1869), L. R. 2 P. C. 505.

cannot justifiably take any action on behalf of the cargo owners (c).

Case 1.—A vessel belonging to Hamburg, during her voyage from South America to London with a cargo belonging to English owners, but not perishable, put into St Thomas to repair. Mails left St. Thomas for London every fortnight, taking fourteen days on the journey. The master made no attempt to communicate with the consignees, but three months after arrival gave a bottomry bond on ship, freight and cargo for the cost of repairs. *Held*, that the bond was invalid against the cargo owners, as the master had not consulted them, though he had reasonable opportunities of so doing (c).

Case 2.—A timber-laden vessel bound to England put into the Mauritius for repairs on June 11. The master placed the ship in the hands of Messrs. B., who, without attempting to raise money on the personal credit of the shipowners, proposed a bottomry bond on ship, freight and cargo. On July 29, the master communicated this proposal to the shipowners, and communicated the need of repairs, but not the bottomry, to the cargo owners, who did not hear of the proposal till September 8, too late to prevent the proposal being carried into effect. *Held*, the bond was invalid against the cargo, both because there was no necessity for it, the cargo not being a perishable one, and because the master had failed to communicate with the cargo owners (d).

Case 3.—Wool was shipped from X. to Z. Forty-five miles from X. the ship was wrecked, the cargo transhipped and brought back to X. It was there found damaged by transhipment, dirty and wet, and it began to heat. Lloyd's agent, on Saturday, December 23, advised an immediate sale, which was fixed for Tuesday, December 26. There were twenty-three owners of the wool, most of them at Z., 900 miles from X.; no letter could reach them in time; there was a telegraph, but owing to the intervention of Sunday and Christmas Day, and the mercantile habits of Z., the jury found communication by telegraph impossible. *Held*, a case was made out entitling the master to sell (e).

Case 4.—Tin plates were shipped from Swansea to New York; after leaving Swansea, the ship was forced by bad weather to put into Queenstown, ship and cargo being damaged. There were sixty cargo owners. The master communicated with the shipowner, but not with the cargo owners, and received instruction to proceed to Bristol to repair. On reaching Bristol she was sunk in a collision. *Held*, that the fact that the master put back

(c) *The Hamburg* (1863), 2 Moore, P. C. N. S. 289. See also *Springer v. G. W. R.* (1920), 4 Ll. L. Rep. 211; and *Sims v. M. R. Co.* (1913), 1 K. B. 103.

(d) *The Onward*, v. s.

(e) *Australasian Steam Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222. Contrast *Acotos v. Burns* (1878), 3 Ex. D. 282, where communication might have been made to the cargo owners.

without communicating with the cargo owners did not in itself render the shipowner liable for the deviation (*f*).

Article 99.—Master's Duty to proceed without Deviation.

In the absence of express stipulation to the contrary the owner of a vessel, whether a general ship or chartered for a special voyage, impliedly undertakes to proceed in that ship (*g*) without unnecessary (*h*) deviation in the usual and customary manner (*i*).

Deviation necessary to save life will be allowed to the shipowner; deviation only necessary to save the property of others will not be allowed (*k*).

To tow another vessel even in the course of the chartered voyage will constitute a deviation; to communicate with a ship in distress will not, as the distress may involve danger to life (*l*).

Delay in performing the chartered voyage may constitute a deviation (*m*), just as delay in carrying out the insured voyage may constitute a deviation under an insurance policy (*n*).

(*f*) *Phelps, James & Co. v. Hill*, (1891) 1 Q. B. 605. See note (*y*), *supra*.

(*g*) *Balian v. Joly Victoria* (1890), 6 T. L. R. 345 (C. A.).

(*h*) See *post*, Article 100.

(*i*) *Leduc v. Ward* (1888), 20 Q. B. D. 475; *Davis v. Garrett* (1830), 6 Bing. 716; *Scaramanga v. Stamp* (1880), 5 C. P. D. 295 (C. A.). See also *Max v. Roberts* (1810), 12 East, 89; *Ellis v. Turner* (1800), 6 T. R. 431. On the implied undertakings in the contract of affreightment, see Articles 28—30.

(*k*) *Scaramanga v. Stamp*, *vide supra*.

(*l*) *Scaramanga v. Stamp*, *vide supra*.

(*m*) Taking a ship in tow "has been held to be equivalent to a deviation, and rightly so, seeing that the effect . . . is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage." *Per Cockburn, C.J., Scaramanga v. Stamp* (1880), 5 C. P. D. at p. 299. *Cf. The Renée Hyafil* (1915), 32 T. L. R. 83, 660; and see Article 100.

(*n*) Mar. Ins. Act, 1906, sects. 48, 49. *Cf.* the remarks of Bowen, L.J., in *Margetson v. Glynn* (1892), 1 Q. B. at p. 343, and of Channell, J., in *Thorley v. Orchis Co.* (1907), 1 K. B. at p. 245 as to the relation of deviation under charterparty and insurance policy. And *cf. Parker v. James* (1814), 4 Camp. 112, and *Peel v. Price* (1815), 4 Camp. 243. "Unseaworthiness" has a different effect under the two contracts. If there were a voyage policy on the cargo involved in *Kish v. Taylor*

The effect of deviation is to displace the special contract of the charterparty or bill of lading, together with all exceptions therein (*o*). The shipowner will, therefore, be liable to the charterer or cargo owner for any loss or damage which the goods sustain, unless he can shew (*i*.) that the loss or damage was occasioned either by the act of God, or by the King's enemies, or by inherent vice of the goods, and (*ii*.) that the said loss or damage must equally have occurred even if there had been no deviation (*p*). And it is immaterial whether the loss or damage arises before, or during, the deviation, or after it has ceased (*q*).

The effect of deviation, and of the consequent displacement of the contract of carriage, upon the shipowner's right to freight, has not been considered. Probably the contractual right to freight disappears. But if the goods, despite the deviation, are carried in safety to their

(1912), A. C. 604, the deviation would have been excusable under sect. 49 of the Mar. Ins. Act, but the policy would have been avoided under sects. 33 and 39. With which, as regards the charterparty, contrast *The Europa* (1908), P. 84.

(*o*) *Morrison v. Shaw Savill*, (1916) 2 K. B. 788, in which the earlier cases are discussed, *e.g.*, *Davis v. Garrett*, *vide supra*; *The Dunbeth*, (1897), P. 133; *Balian v. Joly Victoria* (1890), 6 T. L. R. 345; *Joseph Thorley v. Orchis Co.*, (1907) 1 K. B. 660; *Internationale Guano, &c. v. Macandrew*, (1909) 2 K. B. 360; and contrast *The Europa*, (1908) P. 84.

(*p*) *I.e.*, the shipowner will have the benefit of the common law exceptions of a common carrier, if he can shew that loss by one of those excepted causes was not, and could not have been, occasioned by the deviation: *Morrison v. Shaw Savill*, (1916) 2 K. B. 788; *Lilley v. Doubleday* (1881), 7 Q. B. D. 510. In *Morrison v. Shaw Savill* only the second of the propositions in the text above is insisted on as necessary; but the cause of loss in question was admittedly the King's enemies. Theoretically, it is submitted, the shipowner must also prove the first proposition. Practically, proof of the second proposition is hardly possible as regards any cause of loss except inherent vice of the goods.

(*q*) Pickford, J., in *Internationale, &c., v. Macandrew*, (1909) 2 K. B. 360, commenting on *Joseph Thorley v. Orchis Co.*, (1907) 1 K. B. 660, suggests that this is not correct as regards loss or damage occurring on the voyage before the deviation takes place. But in that case Pickford, J., was dealing with damage arising from inherent vice of the goods. And his decision can be supported on the ground that the shipowner proved (*i*.) loss by inherent vice, and (*ii*.) that this loss must have occurred even if there had been no deviation. In the case of loss by an exception in the bill of lading (*e.g.* sea-perils) occurring before the deviation, the shipowner, it is submitted, would not be entitled to rely on the exception. The deviation has displaced and destroyed his special contract.

destination and are there accepted by the consignee under the bill of lading, there would be impliedly a fresh agreement by him to pay freight, or a claim by the shipowner on a *quantum meruit* (*r*). Theoretically, if freights had gone down, perhaps the shipowner could only claim the market rate and not the contract rate of freight.

Deviation rendered necessary by a breach of the warranty of seaworthiness is a permissible deviation, in the sense that such deviation does not displace the contract of carriage and deprive the shipowner of the benefit of its terms (*s*); but (*semble*) on the ground of the breach of the warranty the shipowner may under such circumstances be deprived of any right to claim contribution in general average in respect of the expenses at the port of refuge to which he deviates (*t*).

See also Article 50 as to the shipowner's right to land cargo temporarily at a second port of loading.

Note.—Express stipulations limiting this implied contract are now usually introduced into charters and bills of lading, e.g.:

“With liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.”

Such a clause allows the shipowner to take on board cargo at the port of call, unless he has already contracted for the whole reach of the ship (*u*), but not to go out of the course of the original voyage to discharge such cargo (*x*).

And “liberty to tow and assist vessels in all situations.” This latter clause will protect a ship in towing off a stranded vessel, though no life is in danger, and though the vessel towing is wrecked and her cargo lost (*y*); and though the towage delays the chartered adventure, if it does not frustrate its commercial object (*z*).

(*r*) *Query* if this could amount to the contract rate of freight if the goods were delivered damaged?

(*s*) *Kish v. Taylor*, (1912) A. C. 604.

(*t*) *Strang v. Scott* (1889), 14 A. C. 601; see *Kish v. Taylor* (*ubi supra*), at pp. 619, 620.

(*u*) *Caffin v. Aldridge*, (1895) 2 Q. B. 648 (C. A.).

(*x*) *The Dunbeth*, (1897) P. 133.

(*y*) *Stuart v. British and African Navigation Co.* (1875), 32 L. T. 257.

(*z*) *Potter v. Burrell*, (1897) 1 Q. B. 97.

All these clauses must be construed in the light of the commercial adventure undertaken by the shipowner. Thus a clause giving leave "to call at any ports," will only allow the shipowner to call at ports which will be passed in the ordinary course of the named voyage in their geographical order (*a*); the words "in any order," will allow the shipowner to depart from geographical order (*b*); but even when there are general words giving liberty to call at ports outside the geographical voyage, these will be cut down, by the special description of the voyage undertaken, to ports on the course of that voyage (*b*). What, however, is the voyage must be determined in the light of commercial custom as well as by considerations of geography (*c*).

Whether any particular port is an "intermediate port," within the meaning of a general liberty to call at intermediate ports, is a question of fact in each case, to be decided upon consideration of all the circumstances,—*e.g.* the class and size of the ship, the nature of the voyage, the usual and customary course, the usual and customary ports of call, and the nature and position of the port in question (*d*).

A clause in bills of lading is not uncommon to this effect: "With liberty to carry the goods or any part of them beyond their port of destination, and to tranship, land, and store them either on shore or afloat, and reship and forward them at the shipowner's expense but at merchant's risk" (*e*).

(*a*) *Leduc v. Ward* (1888), 20 Q. B. D. 475; *Glynn v. Margetson*, (1893) A. C. 351; *White v. Granada S.S. Co.* (1896), 13 T. L. R. 1.

(*b*) *Glynn v. Margetson*, (1893) A. C. 351; see also *Evans v. Cunard Co.* (1902), 18 Times L. R. 374. The words of such a clause may, however, be wide enough to entitle the shipowner even to alter the named destination of the ship, and (by virtue of a clause giving liberty to tranship) to forward the goods by another ship from the new destination: *Hadji Ali Akbar v. Anglo-Arabian, &c. Co.* (1906), 11 Com. Cas. 219.

(*c*) *Evans v. Cunard Co.* (1902), 18 Times L. R. 374, where the goods were shipped from Bari in Italy to Liverpool with a widely worded deviation clause, and on evidence of the business practice as to shipments from Bari, it was held that proceeding *via* Constantinople was not beyond the liberty given by the bill of lading.

(*d*) *Morrison v. Shaw Savill*, (1916) 2 K. B. 783. See especially *Swinfen Eady, L.J.*, at p. 795. See also *Attorney-General v. Smith* (1918), 34 T. L. R. 566.

(*e*) Held, that when the ship carrying the goods has arrived at her port of destination the owner is not entitled, under this clause, to refuse delivery, and to carry them on to another port and thence ship them back: *Sargant v. East Asiatic Co.* (1915), 21 Com. Cas. 344. Held, on a slight variation of the facts, that the shipowner was so entitled: *Broken Hill Co. v. P. & O. Co.*, (1917) 1 K. B. 688.

Case 1.—A ship was chartered to convey lime from X. to Z. She unnecessarily deviated from the usual course, and during such deviation the lime suffered damage by rain. *Held*, that the charterer was entitled to recover such damage from the shipowner (f).

Case 2.—A ship was chartered to proceed from X. to Z.; on her voyage she went to the assistance of a vessel in distress, and agreed to tow her to Y. (out of her course); while thus towing she was wrecked. The jury found the deviation not reasonably necessary to save life, but reasonably necessary to save property. *Held*, that such a deviation was unjustifiable, and that the cargo owners could recover against the shipowner (g).

Case 3.—Oranges were shipped at Malaga, under a bill of lading, stating shipment on board a steamer, "now lying in the port of M., bound for Liverpool with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of . . . Spain . . . for the purpose of delivering coals, cargo, or passengers, or any other purpose whatever." The steamer on leaving Malaga, proceeded to B., a port two days off in the opposite direction to L., where she loaded cargo and then returned and proceeded to L. By reason of this delay, the oranges were rotten on arrival at L. *Held*, that the general words must be limited by the specified voyage, and only allowed the ship to call at ports fairly and substantially in the ordinary course of the voyage, and that they did not justify the actual deviation (h).

Case 4.—Goods were shipped under a bill of lading, which contained an exception of negligence of stevedores in discharging the ship. The ship deviated from the voyage described in the bill of lading. The cargo was damaged by the negligence of the stevedores in discharging the cargo. *Held*, that the deviation deprived the shipowner of the benefit of the exception, and he was liable for the damage (i).

Case 5.—Cargo of a perishable nature was shipped under a bill of lading giving leave to call at ports A. and B., and with various exceptions. The ship was unduly delayed at A. and B., but not by reason of any failure of the shipowner to use reasonable dispatch. After leaving B., the ship deviated from the voyage expressed in the bill of lading, and spent six days on such devia-

(f) *Davis v. Garrett* (1830), 6 Bing. 716. Cf. *Leduc v. Ward* (1888), 20 Q. B. D. 475; *The Dunbeth*, (1897) P. 133; and *Balian v. Joly Victoria* (1890), 6 T. L. R. 345.

(g) *Scaramanga v. Stamp* (1880), 5 C. P. D. 295.

(h) *Glynn v. Margetson*, (1893) A. C. 351. This was the case of a tramp steamer, and a printed form of bill of lading, giving extensive liberties to deviate, had been used with the words "bound for Liverpool" inserted in writing. Cf. *Bray, J.*, in *Sutro v. Heilbut Symons & Co.*, (1917) 2 K. B. at p. 367. In the case of a regular liner, with the whole bill of lading in print, other considerations might arise. Cf. *Hadji Ali Akbar v. Anglo-Arabian Co.*, (1906) 11 Com. Cas. 219.

(i) *Joseph Thorley v. Orchis Co.*, (1907) 1 K. B. 660.

tion. The cargo was damaged by the delays at A. and B., and during the deviation. *Held*, that the shipowner was liable for so much of the damage as was caused by the delay due to the deviation (*k*).

Case 6.—Cargo of H. was shipped in New Zealand on a liner for carriage to London. The bill of lading contained a general liberty to call at intermediate ports. The ship left the usual track to London in order to land other cargo at Havre. When approaching Havre the vessel was torpedoed by a German submarine, and H.'s cargo was lost. *Held*, (i.) that there was a deviation, Havre not being an intermediate port within the liberty, and (ii.) that, as the shipowner could not prove that the cargo must have been lost by King's enemies if there had been no deviation, he was liable to pay damages for the loss (*l*).

Article 100.—Master's Authority to delay and deviate in Cases of Necessity.

If a master receives a credible information that if he continues in the direct course of his voyage his ship or its cargo will be exposed to some imminent peril, as by hostile capture, pirates, icebergs, or other dangers of navigation, or where ship or cargo have been damaged and repairs or re-conditioning are necessary (*m*), he will be justified in reasonable delay to ascertain the nature of the danger, and reasonable delay or deviation to avoid or repair (*n*) it, or to consult his owners, if communication with them is possible (*n*). It is not necessary that

(*k*) *Internationale Guano &c. v. Macandrew*, (1909) 2 K. B. 360.

(*l*) *Morrison v. Shaw Savill*, (1916) 2 K. B. 783.

(*m*) *Cf. Phelps, James & Co. v. Hill*, (1891) 1 Q. B. 605. It would seem from this case, that where the ship is a general ship, and therefore there are many owners of cargo, it will rarely, if ever, be necessary to communicate with them for authority to delay, or deviate, even if one of the objects of such action is reconditioning of cargo: *sed quære*; and see Article 98, *ante*, note (*y*), p. 285.

(*n*) *The Teutonia* (1872), L. R. 4 P. C. 171, at p. 179; *Nobel v. Jenkins*, (1896) 2 Q. B. 326; *The San Roman* (1873), L. R. 5 P. C. 301; *The Wilhelm Schmidt* (1871), 25 L. T. 34; *The Express* (1872), L. R. 3 A. & E. 597; *The Heinrich* (1871), L. R. 3 A. & E. 424; *Polé v. Cetecovitch* (1860), 9 C. B. N. S. 430. Where the danger was foreseen by the shipowner, who after consideration gave his master orders to pursue a certain course, the master had no power to deviate from that course in consequence of that danger: *The Roebuck* (1874), 31 L. T. 274.

the danger should be common to ship and cargo: it will be sufficient if it affects either of them (o).

If the master delays or deviates unreasonably, or to a greater extent than a prudent man under the circumstances would adopt, the cargo owner's position depends on whether the delay is so unreasonable as to put an end to the contract from a commercial point of view. If it is, he will be justified in requiring his goods at the port of delay without payment of any freight (*p*); if it is unreasonable, but not so much so as from a commercial point of view to put an end to the contract, his remedy will be an action for damages (*q*).

If the delay or deviation is reasonable, the charterer cannot require the goods short of the port of destination, without the payment of full freight (*r*).

Case 1.—A Prussian ship with a contraband cargo was chartered from X. to an English port for orders; thence to any safe port in England or the continent between Havre and Hamburg; she received orders to proceed to Dunkirk, and had arrived off that port on June 16, when she was informed that war had broken out between France and Prussia. The captain sailed to the Downs to inquire, and anchored there on June 17 (Sunday); on the 18th, the shipowner ordered him not to go into Dunkirk; on the 19th he put into Dover, and there was informed that war between France and Prussia, imminent from the 10th of June, had been declared on the 19th. *Held*, that putting back to the Downs to obtain information and the delay on the 19th were justifiable, and that the goods owners could not obtain their goods at Dover without payment of full freight (*s*).

(o) *The Teutonia*, *vide supra*.

(p) See, however, *The Patria* (1871), L. R. 3 A. & E. 436, at p. 464, on which see note (t), *post*, *contra*, see *Castel v. Trechman* (1884), 1 C. & E. 276.

(q) See Articles 28, 30, and see Article 99 as to the nature of his claim for damages.

(r) *The Teutonia*, *vide post*.

(s) *The Teutonia* (1872), L. R. 4 P. C. 171. *The San Roman*, *The Heinrich*, *The Express*, and *The Wilhelm Schmidt*, note (n), *supra*, all arose out of similar circumstances, and in effect decided that reasonable apprehension of capture justifies delay or deviation. The latter part of the decision in *The Teutonia* can be supported either on the ground in the judgment, that the master was entitled to delay for a reasonable time by fear of capture, and could not be required to abandon his voyage without the payment of full freight; or on the ground that as the charterers had not named a port which could safely be entered, the fulfilment of the voyage was prevented by their failure to name a "safe

Case 2.—Coffee was shipped on a German ship, under a bill of lading, containing only an exception of perils of the seas, from America to Hamburg. Near Falmouth the master was informed that war had broken out between France and Germany, and he accordingly put into F. on August 23. Hamburg was then blockaded by the French Fleet, and remained blockaded till September 18. During all that time and until November 7, the English Channel and North Sea were rendered unsafe by French cruisers. On September 18, when the blockade was raised, the goods owner offered full freight for the goods delivered either at F. or at Hamburg. The master refused to proceed to Hamburg on the ground of the danger of capture, and refused to deliver the cargo. *Held*, that the master's delay (of fifty days, September 18 to November 7) was unreasonable, and his refusal either to proceed to H. or to deliver the cargo, a breach of the contract (t); and that the goods owners were therefore entitled to the cargo.

Case 3.—Goods were shipped at Swansea on a general ship starting from Bristol, and calling at S., to New York. The ship put into Queenstown, with damage to ship and cargo through bad weather. The captain communicated with the shipowners at Bristol, who ordered him to return there. He did not communicate with the cargo owners. When in the Avon, the ship and cargo were lost by an excepted peril. Cargo owners sued the shipowner for loss on a deviation. It was proved that the ship, but not the cargo, could be repaired at Queenstown; that ship and cargo could be repaired and cargo sold at Swansea, sixty miles short of Bristol; that ship could be advantageously repaired and cargo sold at Bristol, though there was no evidence as to whether the cargo could be reconditioned there. The jury found the master had acted reasonably and the deviation was justifiable. The C. A. refused to disturb their verdict, and *held*, that under

port," and therefore the master was entitled to full freight. See *post*, Article 139. And see *St. Enoch Co. v. Phosphate Co.*, (1916) 2 K. B. 624; and *Aktieselskabet Olivebank v. Dansk Fabrik* (1919), 2 K. B. 162.

(t) *The Patria* (1871), L. R. 3 A. & E. 486. It is difficult to understand this case, as the same judge had held a longer delay from similar causes reasonable in other cases (e.g., *San Roman*, 53 days; *Express*, 170 days). The absence of the exception "restraint of princes" may make the difference (see Article 82). It may be, though it is not so stated, that the delay put an end commercially to the contract; or the case may be rested on the ground that the goods owner was entitled to demand his goods on tender of full freight, which, however, would not prove that he was entitled to them without any payment of freight on the ground of unreasonable delay. Sir R. Phillimore suggested that on the refusal of the master to proceed to H. the goods owners were entitled to their goods on payment of a *pro rata* freight, but it seems clear that such a refusal if wrongful would entitle them to their goods without payment of any freight at all. *Medeiros v. Hill* (1832), 8 Bing. 281, shews that, if the parties knew of the blockade when the charter was entered into, the existence of the blockade would be no defence to an action for not proceeding towards the blockaded ports.

the circumstances there was no necessity to communicate with the cargo owners and obtain their sanction (*u*).

Article 101.—Master's duty to take care of Goods.

The master, as representing the shipowner, has the duty of taking reasonable care of the goods entrusted to him, in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, *e.g.* by ventilation, pumping, or saving goods which accident has exposed to danger (*x*).

He has also the duty of taking reasonable measures to prevent the loss or deterioration of the goods even by reason of accidents, for the necessary effects of which the shipowner is by reason of the bill of lading under no liability, and the shipowner will be liable (*y*) for any neglect of such duty by the master (*x*).

The place, the season, the extent of the deterioration, the opportunities at hand, the interests of other persons in the adventure whom it might be unfair to delay for the sake of that part of the cargo in peril, all the circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. The performance of the duty cannot be insisted on if it involves deviation, but reasonable delays in a port of call for purposes connected with

(*u*) *Phelps, James & Co. v. Hill*, (1891) 1 Q. B. 605. See note (*y*), p. 285.

(*x*) *Notara v. Henderson* (1872), L. R. 5 Q. B. 346; 7 Q. B. 225, *per* Willes, J., at p. 235; *Tronson v. Dent* (1853), 8 Moore, P. C. 419; *Australasian Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222. *Cf.* *Garriock v. Walker* (1873), 1 Sc. Sess. Cases, 4th Ser. 100; *Adam v. Morris* (1890), 18 Sc. Sess. Cases, 153; *Phelps, James & Co. v. Hill*, (1891) 1 Q. B. 605; *Hansen v. Dunn* (1906), 11 Com. Cas. 100. The master is entitled to estimate the extent of delay to the adventure by the probabilities of the case and if he is justified by them in not incurring the delay, he will not afterwards be held liable because his expectations are falsified by events: *The Savona*, (1900) P. 252. For a discussion, whether in case of wreck of the ship, the shipowners may charge for the services of agents in saving, conditioning, and forwarding the goods, see *Rose v. Bank of Australasia*, (1894) A. C. 687.

(*y*) This is not, like the authority to tranship, a power for the benefit of the shipowner only, to secure his freight: *De Cuadra v. Swann* (1864), 16 C. B. N. S. 772.

the voyage, though not necessary to its completion, will not amount to deviation (*z*).

As the master has to exercise a discretionary power, his owner will not be liable unless it is affirmatively proved that the master has been guilty of a breach of duty (*z*).

Semble, the master will have a lien on the goods for any expenses incurred in the performance of such duty (*a*).

Case 1.—F. shipped beans on the *S.* on a voyage to *Z.*, the bill of lading giving leave to call at ports on the voyage. The vessel called at *Y.*, and on her way out came into collision, whereby the beans were damaged by salt water; she put back to *Y.* The wet beans might have been warehoused and dried at *Y.*, with material benefit to them, and without unreasonable delay to the adventure. The ship proceeded to *L.* without drying them. *Held*, that the shipowners were liable to *F.* for the master's failure to dry the beans (*b*).

Case 2.—A ship carrying a cargo of maize from the Plate to Port Elizabeth, put into Cape Town in a damaged condition. The captain communicated with his owners, with underwriters on ship, freight, and cargo, and with owners of cargo. Unreasonable delay ensued while it was being considered whether the ship should be repaired to continue the voyage, be towed with the cargo, or the cargo transhipped to earn freight, and owing to the conflict of interests in these various courses, the cargo was damaged by being kept on board during this delay. *Held*, that the shipowner was liable to the cargo owners for the damage (*c*).

Article 102.—Master's Power to sell damaged Goods.

The condition of the goods may be such that immediate sale is the wisest course in the interests of the cargo owner; in such a case the master, if he cannot communicate with the cargo owner and receive his instructions, will be bound to sell them (*d*). Such a condition will

(a) *Hingston v. Wendt* (1876), 1 Q. B. D. 367. See *per* Blackburn, J., at p. 373.

(b) *Notara v. Henderson* (1878), L. R. 7 Q. B. 225.

(c) *Hansen v. Dunn* (1906), 11 Com. Cas. 100.

(d) *Australasian S. Nav. Co. v. Morse* (1872), L. R. 4 P. C. 222; *Acatos v. Burns* (1878), 3 Ex. D. 282; *Tronson v. Dent* (1853), 8 Moore, P. C. 419, 449, *et seq.*; *Atlantic Insurance Co. v. Huth* (1880), 16 Ch. D. 474; *Vlierboom v. Chapman* (1844), 13 M. & W. 230, and see Articles 97, 98. As to German Law, see *The August*, (1891) P. 328; *The Industrie*, (1894) P. 58.

arise if the master cannot convey the goods or cause them to be conveyed to their destination as merchantable articles, either at all, or without an expenditure clearly exceeding their value after their arrival at their destination (e). If, however, the master can communicate with the cargo owner, before selling the goods, he must do so, or he will be liable for damages for conversion (f).

Case 1.—Maize was shipped on a voyage from X. to Z.; at Y., an intermediate port, it was found heated and sprouting; the master transhipped it into lighters: and informed the shipper's agent by telegraph on March 10 and 13 of its condition, suggesting that it could not be carried on. He received two telegrams in reply that the shipper wished the grain to be forwarded. On March 27 the captain telegraphed again: "Have held survey which reports grain unfit for shipment; will be sold to-morrow by public auction"; and it was sold on the 28th. The sale was a prudent measure, but not one of such urgent necessity as to give no time or opportunity for communicating with the owner. *Held*, that no case was made out entitling the master to sell, as he was bound to have waited the result of his communication of the proposed sale to the owner (g).

Case 2.—The ship R., with a mixed cargo of metal and perishable articles, was wrecked, on April 19, in Algoa Bay fifty miles from Port Elizabeth. The Consul there, on April 22, advised the captain to sell the ship and cargo, which he did on April 30. The captain did not go to P. E., or make any attempt to raise money for salvage, or to induce others to attempt the salvage. He had no funds in his hands. There was conflicting evidence as to whether such attempts, if made, would have been successful, but much evidence that the course adopted was the most prudent. *Held*, that no necessity for the sale existed, such as would make the master the agent of the cargo owner to effect a sale, and that the sale must therefore be rescinded (h).

(e) *Atlantic Insurance Co. v. Huth* (1880), v. s. at p. 481. As to the person liable for unjustifiable sale by master, see *Wagstaff v. Anderson* (1879), 4 C. P. D. 283, and Articles 2, 93.

(f) *Springer v. G. W. R.* (1920) 4 Ll. L. Rep. 211; cf. *Sims v. M. R. Co.*, (1913) 1 K. B. 103.

(g) *Acatos v. Burns* (1878), 3 Ex. D. 282. See also *Australasian S. Nav. Co. v. Morse* (1872), L. R. 4 P. C. 222, cited *ante*, Article 98, Case 3, p. 286.

(h) *Atlantic Insurance Co. v. Huth* (1880), 16 Ch. D. 474. The sale was rescinded as invalid by the law of the country where it was made; if it had been valid by that law, though invalid by English law, it could not have been rescinded, though the captain would be responsible to the owners of the cargo for an improper sale: *Cammell v. Sewell* (1860), 5 H. & N. 728.

Article 103.—Master's Power of Transhipment.

Where a vessel (*i*) in which goods are shipped is hindered by an excepted peril from completing the contract voyage, if the obstacle can be overcome by reasonable expenditure or delay, the shipowner must do his best to overcome it. It is only where an excepted peril renders the completion of the voyage physically impossible, or so clearly unreasonable as to be impossible in a business point of view, that the shipowner is justified in throwing up the voyage without the consent of the charterer or shipper (*k*).

Where the shipowner is prevented from completing the contract voyage, by a peril which cannot be overcome in a reasonable time, or damage which cannot be repaired at a reasonable expense, he is not bound either to repair or tranship (*l*); though, if he elects to do neither, he must hand over his cargo to the cargo owner (*m*) freight free, or, if the cargo owner is not present to receive it, the master must act for the best, and as the cargo owner's agent, unless he can consult him. He has, however, the right to earn his freight either by repairing his own ship and proceeding to the port of destination, or by transshipping the goods into another vessel to be forwarded thither (*n*), and he may delay the transit a reasonable

(*i*) We state the rules of English law. Foreign law may be applicable to a foreign ship. See Article 7; *The Bahia* (1864), B. & L. 292; *The Express* (1872), L. R. 3 A. & E. 597.

(*k*) *Assicurazioni v. Bessie Morris S.S. Co.*, (1892) 1 Q. B. at p. 581; in C. A., (1892) 2 Q. B. 652. See also *The Savona*, (1900) P. 252.

(*l*) In *Shipton v. Thornton* (1839), 9 A. & E. 314, the point was much discussed whether it was not the duty, as well as the right, of the master to tranship the goods, if opportunity offered. The point was not determined, and does not seem to have been expressly decided, except by Kennedy, J., in a *dictum* in *Hansen v. Dunn* (1906), 11 Com. Cas. 100, at p. 102. And on general principles (see Article 30), it would seem that there is no such duty.

(*m*) See *per* Bowen, L.J., in *Svendsen v. Wallace* (1884), 13 Q. B. D. at p. 88.

(*n*) See *per* Lawrence, J., in *Cook v. Jennings* (1797), 7 T. R. 381, at p. 385; and *per* Lindley, J., in *Hill v. Wilson* (1879), 4 C. P. D. 329, at p. 333; *De Cuadra v. Swann* (1864), 16 C. B. N. S. 772.

time for either of these purposes (o). If he spends an unreasonable time in making up his mind which course to adopt, and the cargo is damaged during the delay, the shipowner will be liable for the damage to the cargo owner (p).

In case of justifiable transshipment by the master as agent for the shipowner, the cargo owner will be bound to pay the full freight originally contracted for, though the transshipment was effected by the shipowner at a smaller freight (q).

Semble, that the master cannot, without express authority, bind the cargo owner to more unfavourable terms in the contract of transshipment, as by wider exceptions (r), or to pay a larger freight than that originally contracted for, unless communication with the cargo owner is impossible, and forwarding the cargo on such terms would appear to a reasonable man to be the most beneficial course in the interests of the cargo (s).

If the hindrance of the ship's voyage is not caused by an excepted peril, the shipowner is not entitled as of right to tranship on his own account on terms more onerous to the shipper than the original contract, (though he may be bound to do so on account of the cargo owner); but he is liable for delay or failure to deliver (t).

Note.—In many bills of lading (especially through bills of lading and bills issued by regular steamship lines) there is an express provision that the shipowner shall have liberty to

(o) *The Bahia* (1864), B. & L. 292; *The Soblomsten* (1866), L. R. 1 A. & E. 293; *Cargo ex Galam* (1863), B. & L. 167; *The Gratitude* (1801), 3 C. Rob. 240; *Shipton v. Thornton* (1838), 1 P. & D. 216, 231 *et seq.*

(p) *Hansen v. Dunn* (1906), 11 Com. Cas. 100.

(q) *Shipton v. Thornton*, *vide supra*; *The Bernina* (1886), 12 P. D. 36.

(r) *The Bernina* (1886), 12 P. D. 36.

(s) *Gibbs v. Grey* (1857), 2 H. & N. 22, where it was held that the master had no power to bind the consignee to ship a full cargo, or, *semble*, to pay a higher freight than that current at the time; and see *Cargo ex Argos* (1873), L. R. 5 P. C. 134, at p. 165; *Shipton v. Thornton*, (1838) 1 P. & D. 216, at p. 234.

(t) *Shipton v. Thornton*, *vide supra*; *The Bernina*, *vide supra*.

tranship and forward the goods "by any other line" (u), or "by any other steamer or steamers." The terms of such clauses vary considerably, but there is not usually much doubt as to their meaning.

Where in such a clause there was liberty to tranship and forward "at ship's expense but at shipper's risk," it was held that the phrase "at shipper's risk" applied only to the process of transshipment, and did not supersede the general provisions of the bill of lading as to the transit after transshipment to the destination (x).

Case 1.—F. shipped goods on board the *S.* at a named freight for a voyage from X. to Z.; on the voyage, at Y. the necessity for transshipment arose, and the master made a contract for the forwarding of the goods to Z. at a freight which, together with *pro rata* freight from X. to Y., was less than the original freight agreed upon. On arrival at Z., F. refused to pay more than such *pro rata* and forwarding freight. Held, that he was bound to pay the freight originally agreed upon (y).

Case 2.—A shipowner carried goods under a contract of affreightment which did not except negligence of the master and crew. The ship was so injured by the negligence of her master as to be unable to complete the voyage; and the master thereupon transhipped the cargo into another vessel under a contract containing an exception of negligence of the master and crew. Such vessel was lost by negligence of the master and crew. Held, that the transshipment being for the benefit of the shipowner he could not bind the cargo owner by more onerous exceptions, and was therefore liable for the loss (z).

Case 3.—A ship chartered (with perils of the sea excepted) by C. to proceed to London, ran ashore near Gibraltar. Ship and cargo were damaged; the ship was repaired in six weeks at a cost of £750, and proceeded to the United Kingdom with another cargo. Some of the original cargo was sold, some with the consent of its owners was transhipped; the latter cargo could have been carried to London in the repaired ship without unreasonable delay, and C. never consented to the original voyage being abandoned. Held, that the shipowner, if he could repair within a reasonable time, and at a reasonable cost, was bound to remedy the effect of the excepted perils, and carry on the cargo in the same ship (a).

(u) Which phrase does not mean that the substituted ship must be a "liner": *Hadji Ali Akbar v. Anglo-Arabian Co.* (1906), 11 Com. Cas. 219.

(x) *Stuart v. British and African Co.* (1875), 32 L. T. 257.

(y) *Shipton v. Thornton* (1838), 1 P. & D. 216. See *Matthews v. Gibbs* (1860), 30 L. J. Q. B. 55.

(z) *The Bernina* (1886), 12 P. D. 36.

(a) *Assicurazioni v. Bessie Morris S.S. Co.*, (1892) 2 Q. B. 652.

Article 104.—Master's Power of raising Money on Cargo.

The master will be entitled to raise money on the cargo, to enable him to complete the contract voyage, if such course is the most beneficial for the cargo owner, when the master cannot obtain money in any other way, and if the cargo owner cannot be communicated with, or, being communicated with, omits to give any instructions whatever.

Money may be so raised either: (1.) by a sale of part of the cargo (b); in which case the goods owner may either treat the proceeds of the sale as a loan to the shipowner; or, if the vessel reaches her destination, he may claim an indemnity against any loss occasioned to him by the sale, but in the latter case he must pay the freight which would have been earned if the goods sold had been carried to their destination (c). (2.) By a loan on the special security of the cargo, analogous to a bottomry bond (c).

Article 105.—Bottomry.

By English law (d) the master as agent of the cargo owner has authority to bind the cargo by a bottomry bond as security for advances made to him, when such advances are necessary in the interests of the cargo (e), and when it

(b) See *Hopper v. Burness* (1876), 1 C. P. D. 137, and Articles 97, 98.

(c) See Article 143 on Freight. This contract is sometimes known as *respondentia*, on which see *Busk v. Fearon* (1803), 4 East, 319; *Glover v. Black* (1763), 3 Burr. 1394; *The Sultan* (1859), Swabey, 504.

(d) The law by which the powers of the master to bind ship and cargo by a bottomry bond are to be determined is, in the absence of express evidence of contrary intention, the law of the ship's flag. See Article 7.

(e) *The Hamburg* (1864), 2 Moore, P. C. N. S. 289; *The Karnak* (1869), L. R. 2 P. C. 505; *The Onward* (1873), L. R. 4 A. & E. 38, at p. 58; *The Gratitude* (1801), 3 C. Rob. 240; *The Faithful* (1862), 31 L. J. Adm. 81; *Wallace v. Fielden* (1851), 7 Moore, P. C. 398; *Dymond v. Scott* (1877), 5 Sc. Sess. C., 4th Ser. 196. When the master has bound the cargo without authority, the cargo owner can recover from the shipowner any sums he has had to pay to obtain the cargo, on an implied contract of indemnity: *Benson v. Duncan* (1849), 3 Ex. 644, and see Article 97. A hypothecation note beyond the master's authority may yet create a personal liability on the shipowner, the hypothecation being rejected: *Assicurazioni v. Bessie Morris S.S. Co.* (1892) 1 Q. B. at p. 575.

is either impossible to communicate with the cargo owner and receive his instructions within such a time as will afford any reasonable prospect of success in protecting the cargo (*f*), or when, a proper communication (*g*) of the necessity of raising money by bottomry having been made to the cargo owner, he has omitted to send any instructions to the master (*h*).

It is essential to a bottomry bond that there should be a maritime risk involved, *i.e.* that the money advanced should only be payable if the ship or cargo arrives safely at its destination (*i*); and that it should not be merely an advance on the personal credit of the master, goods owner, or shipowner (*k*). If there is a maritime risk involved, the absence of maritime interest, and the presence of collateral stipulation as to repayment, or the insurance of the loan, do not prevent the instrument from being a valid bottomry bond (*l*).

Deviation from the voyage described in the bond without consent of the lender makes the sum advanced at once payable (*m*).

(*f*) *The Onward*, *v. s.*; *The Bonaparte* (1853), 8 Moore, P. C. 459; *The Hamburg*, *v. s.*; *The Olivier* (1862), Lush, 484; *The Lizzie* (1868), L. R. 2 A. & E. 254; *The Panama* (1870), L. R. 3 P. C. 199.

(*g*) As to what is a proper communication, see *Kleinwort v. Cassa Marittima of Genoa* (1877), 2 App. C. 156; *The Onward*, *v. s.*; *The Bonaparte*, *v. s.*, and Article 98.

(*h*) *The Bonaparte*, *vide supra*.

(*i*) *The Indomitable* (1859), Swabey, 446; *Stainbank v. Shepard* (1859), 13 C. B. 418; *The Heinrich Bjorn* (1885), 10 P. D. 44 (C. A.); *Miller v. Potter* (1875), 3 Sc. Sess. C. 105. Nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time the bond is running. Therefore, cargo not yet shipped cannot be pledged: *The Jonathan Goodhue* (1858), Swabey, 355. Nor can cargo which, having been shipped in another ship, has been burnt: *The Sultan* (1859), Swabey, 504. If part of the cargo is lost on the voyage, the owners of the cargo will be freed from a proportionate part of the sum secured by the bond: *The Sultan*, *vide supra*. Freight to be earned on a subsequent voyage is not the subject of bottomry: *The Staffordshire* (1872), L. R. 4 P. C. 194.

(*k*) *Busk v. Fearon* (1803), 4 East, 319; *The Heinrich Bjorn*, *vide supra*. The fact that bills are given as a collateral security does not necessarily invalidate the bond: *The Onward*, *vide supra*; *The Staffordshire*, *vide supra*. Cf. *Miller v. Potter*, *v. s.*; *The Haabet*, (1899), P. 295.

(*l*) *The Haabet*, (1899) P. 295; *The Dora Forster*, (1900) P. 241.

(*m*) *London and Midland Bank v. Neilsen* (1895), 1 Com. Cases, 18.

Case.—A., owner of the ship *R.*, lying at X., gave B. the following document: "In consideration of N. advancing me, A., £600 for necessities supplied to the ship *H.B.*, I undertake to return them the whole amount so advanced me with interest and charges on the return of the *R.* from her present voyage. B. is also authorised to cover the said amount advanced me by insurance on ship out and home at my cost." *Held*, that this was not a bottomry bond, as there was no maritime risk, but an alternative security for the lender, viz. either the personal liability of A. if the ship returned, or the policy of insurance if she were lost (n).

Article 106.—Conditions justifying Bottomry.

Whether there is necessity for raising money on the cargo by bottomry must depend on whether any arrangement more beneficial to the cargo than the raising of money on it to enable the voyage to be prosecuted, can be made (o). The foundation of the master's authority to bind the cargo is the prospect that such a course will be the one most beneficial to the cargo owner (p). Thus if the master could obtain money on his personal credit, or that of the shipowner (q), or if there is an agent of the shipowner within reach, whom he has not consulted (r), his authority to bind the cargo by bottomry will not arise. The question will not only be, was there a necessity for bottomry at all, but was there a necessity for a bond for that amount; and it will not avail the bondholder to say he made reasonable inquiries if the

(n) *The Heinrich Bjorn*, *vide supra*.

(o) *The Karnak* (1869), L. R. 2 P. C. 505. The money may be raised to free the cargo from arrest for salvage: *The Sultan* (1859), Swabey, 504.

(p) *The Onward*, L. R. 4 A. & E. 38.

(q) *Soares v. Rahn* (1838), 3 Moore, P. C. 1; *Heathorn v. Darling* (1836), 1 Moore, P. C. 5. The fact that money was advanced before the bond was given is immaterial if the money was advanced in view of a bond being given: *The Laurel* (1863), B. & L. 191.

(r) *Lyall v. Hicks* (1860), 27 Beav. 616; *The Faithful* (1862), 31 L. J. Adm. 81. But an advance by agents of the shipowner on bottomry is not invalid, if they refused to advance on his personal credit, and gave the master a chance of getting money elsewhere: *The Hero* (1817), 2 Dod. at p. 144; *The Staffordshire* (1872), L. R. 4 P. C. at p. 203.

amount expended is in fact unnecessary and unreasonable (*s*).

Where communication with the cargo owner is reasonably practicable the master must lay the facts before him, and ask his instructions as to bottomry before acting. It is not sufficient merely to state the injuries to the ship, and the need of repairs or other steps in the interest of the cargo, without a statement of the necessity of raising money by bottomry (*t*). If the cargo owner asks for further information the master has no right to act until he has supplied such further information, if such further information should have been supplied at first (*u*).

Article 107.—Jettison.

The captain's authority to jettison goods properly stowed arises in cases of necessity (*x*), *i.e.* where a prudent man in the interest of the adventure would take such a course (*y*).

Where such necessity arises the captain in making the jettison acts as agent of the cargo owner (*y*); if no such necessity exists, or if the goods jettisoned were improperly stowed, *e.g.* on deck, and the jettison is therefore unjustified, the captain acts only as the agent of the shipowner, who is liable for his acts (*z*) unless protected by exceptions (*a*).

(*s*) *The Pontida* (1884), 9 P. D. 177. As to various items for which bottomry may be justified, see *The Glenmanna* (1860), Lush. 115; *The Edmond* (1861), Lush. 211.

(*t*) *Wallace v. Fielden* (1851), 7 Moore, P. C. 398; *The Onward*, L. R. 4 A. & E. 38.

(*u*) *Kleinwort v. Cassa Marittima* (1877), 2 App. C. 156.

(*x*) It is almost impossible that the question of communicating with the cargo owner should arise, except perhaps in a case of stranding.

(*y*) *Burton v. English* (1883), 12 Q. B. D. 218, at pp. 220, 223; and see Article 97.

(*z*) *Royal Exchange S.S. Co. v. Dixon* (1886), 12 App. C. 11; *Newall v. Royal Exchange Steamship Co.* (1885), 33 W. R. 342, 368.

(*a*) *E.g.*, "at merchant's risk": *Burton v. English*, *vide supra*; and perhaps "negligence of master in navigation, etc." See Articles 90, 110.

Note.—Jettison made in a time of common peril seems first mentioned in a reported case in 1609 (b), but rather as affording a defence to the shipowner on a claim for loss of the goods, than as raising any question of general average. But there is record of what was apparently a claim for general average arising from jettison of a ship's boat and oars and of cargo in 1540 (c).

Article 108.—General Average.

All loss which arises in consequence of extraordinary (d) sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested (e).

To give rise to a claim for general average contribution (f):—

1. There must be a common danger (g), which must be

(b) *Mouse's Case*, 12 Coke, Rep. 63.

(c) *The Trinity James* or *The Chance*, Marsden, Select Pleas of the Admiralty Court (Selden Society, 1892), Vol. I., p. 95.

(d) Not expenses incurred to avert an ordinary peril on that voyage at that time: *Société Nouvelle v. Spillers*, (1917) 1 K. B. 865.

(e) *Per Lawrence, J.*, in *Birkley v. Presgrave* (1801), 1 East, 220, at p. 228; see also *per Brett, M.R.*, in *Svensen v. Wallace* (1884), 13 Q. B. D. at p. 73. As to the etymology and history of the word "average" see the N. E. D. *sub voce*. The subject of general average is so entirely in the hands of average adjusters, and so ably dealt with in the work of the late Mr. Lowndes (see 6th edition (1922) edited by de Hart and Rudolf) that we have not thought it necessary to treat it in any length or detail. We do not know when "average adjusters" first practised as a special profession. In *Crofts v. Marshall*, 7 C. & P. at p. 606, on December 19, 1836 "Mr. Richards (a Settler of Averages at Lloyd's) was then called"; and in *Pirie v. Steele*, 8 C. & P. at p. 203, in 1837, Mr. Richards, being called, said: "I am a taker of averages." The practice of "Mr. Richards" giving evidence in this capacity has continued.

(f) *Pirie v. Middle Dock Co.* (1881), 44 L. T. 426.

(g) See *Walthev v. Mavrojan* (1870), L. R. 5 Ex. 116; *Royal Mail Co. v. Bank of Rio* (1887), 19 Q. B. D. 362; *Hamel v. P. & O. Co.*, (1908) 2 K. B. 298. It is not, however, necessary that there should be a contribution legally recoverable to make the act giving rise to the contribution a general average act. Where ship, cargo and freight belong to the same owner, so that no legal claim for contribution arises, a voluntary sacrifice to save them may yet be a general average act, giving rise to a claim on underwriters for a general average loss: *Montgomery v. Indemnity Ins. Co.*, (1902) 1 K. B. 734 (C. A.). *Semble*, that a sacrifice by the owner of a seeking ship in ballast is not a general average act, there being only one interest.

real, and not merely apprehended by the master, however reasonably (*h*).

2. There must be a necessity for a sacrifice (*f*).

3. The sacrifice must be voluntary (*i*).

4. It must be a real sacrifice, and not a mere destruction and casting off of that which had become already lost and consequently of no value (*i*).

5. There must be a saving of the imperilled property through the sacrifice (*h*).

6. The common danger must not arise through any default for which the interest claiming a general average contribution is liable in law (*l*). Therefore the fact that the common danger arises from the nature of the cargo (*e.g.* from spontaneous combustion of coal) does not prevent the cargo owner from claiming contribution for sacrifice of the cargo, unless he was guilty of some breach of contract or of duty in shipping it (*m*).

Note.—The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the con-

(*h*) *Watson v. Firemen's Fund Co.*, (1922) 2 K. B. 355. "Mere *bonâ fides* on the part of the captain is not sufficient; it must be shown that those circumstances did in fact exist which give rise to the right of contribution"; Brett, L.J., *Whitecross Co. v. Savill* (1882), 8 Q. B. D. at p. 662.

(*i*) *Shepherd v. Kottgen* (1877), 2 C. P. D. 585. The sacrifice is voluntary even when it is made by order of the port authorities, the master assenting, if it was made for the benefit of ship and cargo: *Papayanni v. Grampian S.S. Co.* (1896), 1 Com. Cases, 448; probably not if for the benefit of other ships.

(*k*) *Pirie v. Middle Dock Co.*, *ubi supra*. See also *Chellew v. Royal Commission*, (1922) 1 K. B. 12.

(*l*) *Strang v. Scott* (1889), 14 App. C. at p. 608; *Schloss v. Heriot* (1863), 14 C. B. N. S. 59. Thus in *The Carron Park* (1890), 15 P. D. 203, the shipowner succeeded in recovering a general average contribution for expenditure occasioned by the negligence of his servants, from liability for which he was protected by an exception in the bill of lading. This case was approved by the C. A. in *Milburn v. Jamaica Fruit Co.*, (1900) 2 Q. B. 540. Though deviation made necessary by breach of the warranty of seaworthiness does not displace or destroy the contract of carriage (*Kish v. Taylor*, (1912) A. C. 604), yet the shipowner, by reason of the breach (unless exempted by exceptions for liability for unseaworthiness), would be debarred from claiming contribution in general average towards, *e.g.*, the expenses at the port of refuge to which he deviates: *Strang v. Scott* (*ubi supra*); *Kish v. Taylor* (*ubi supra*), at pp. 619, 620.

(*m*) *Greenshields v. Stephens*, (1908) App. Cas. 431.

tract to carry, and it is not concerned with liabilities to contribution in general average where a loss has been occasioned by a sacrifice properly made for the general benefit (*n*). But express clauses, such as "General average payable according to York-Antwerp Rules, 1890," may vary liability for general average; and the presence of the negligence clause in the bill of lading may enable the shipowner to recover general average contribution for sacrifices rendered necessary by the negligence of his master, though without such a clause he could not (*l*).

The clause "not to be liable for any damage capable of being covered by insurance" does not free the shipowner from liability to general average contributions (*n*).

Article 109.—Classes of General Average Loss.

The following sacrifices or expenses may give rise to a claim for a general average contribution:—

I. Sacrifices—1. of cargo:

(a) By jettison (Article 110):

(b) By fire, directly or indirectly (Article 111):

(c) By sale, or other sacrifice of value (*o*)
(Article 112).

2. of ship or tackle (Article 113):

3. of freight (Article 114).

II. Expenditure on ship in replacing a general average loss, or in a port of refuge (Articles 115, 116).

Article 110.—Jettison of Cargo.

Where cargo stowed in a proper part of the ship is properly jettisoned for the common good, its owner is entitled

(*n*) *Per Lush, J., in Schmidt v. Royal Mail S.S. Co.* (1876), 45 L. J. Q. B. 646.

(*o*) *As in Anglo-Argentine Co. v. Temperley*, (1899) 2 Q. B. 403, where cattle were diminished in value by the shipowner's putting into an infected port to repair sea damage. Damage to cargo caused by discharging it in order to repair damage to the ship sustained by the perils of navigation, the cargo being in no danger, does not give rise to a claim for general average contribution: *Hamel v. P. & O. Co.*, (1908) 2 K. B. 298.

to a general average contribution from the other interests in the adventure: *i.e.* the ship, the freight, and the rest of the cargo (*p*). He can enforce this claim either by a direct action against each of the owners of the ship or cargo (*q*), or by claiming through the master, who is his agent for that purpose, a lien on each parcel of goods saved to satisfy its proportionate liability (*p*). An interest whose fault has led to the jettison is not entitled to a general average contribution in respect thereof, but innocent owners of cargo jettisoned in consequence of the fault of another interest are not thereby deprived of their remedy (*p*).

Cargo stowed on deck (which is not a usual or proper place of stowage), if jettisoned, does not give rise to a general average contribution from the other interests in the adventure, unless it is so stowed in pursuance of a recognised custom of the trade or port, or by consent of all the other interests in the adventure (*r*).

If the cargo is shipped on deck by agreement between its owner and the shipowner, and in the absence of a custom so to load, the owner of such cargo, if jettisoned, has no right to a general average contribution either against other cargo owners, or against the shipowner and person entitled to the freight, if there are other cargo owners (*s*); such a jettison may give rise to such a contribution from the ship and freight, if there are no other

(*p*) *Strang v. Scott* (1899), 14 App. C. 601, 606. But see note (*l*), p. 306. See Articles 90, 108, *supra*; as to the amount of the contribution, see *Fletcher v. Alexander* (1868), L. R. 3 C. P. 375.

(*q*) *Dobson v. Wilson* (1813), 3 Camp. 480.

(*r*) *Strang v. Scott* (1889), 14 App. C. at p. 608; *Wright v. Marwood* (1881), 7 Q. B. D. 62, at p. 67. See *Burton v. English* (1883), 12 Q. B. D. 218 (C. A.), for such an agreement, and *Gould v. Oliver* (1837), 4 Bing. N. C. 134, for such a custom; the custom also exists in the coasting trade; it was not proved in *Newall v. Exchange Shipping Co.* (1885), 33 W. R. 342, 868. As to deck stowage on inland waters, see *Apollinaris Co. v. Nord Deutsche Co.*, (1904) 1 K. B. 252. See also No. I. of the York-Antwerp Rules, Appendix IV., *infra*.

(*s*) *Wright v. Marwood*, *vide supra*; not so, if there is a custom so to load: *Gould v. Oliver*, *vide supra*.

cargo owners (*t*), even though such cargo according to the charter is to be carried "at merchant's risk" (*u*).

The clause "at merchant's risk" covers liability for improper jettison, resulting from acts of the crew done as the servants of the shipowner; but not for a proper jettison which is made by the captain as agent of the cargo owner (*u*). If the goods are stowed on deck without the merchant's consent or a binding custom so to stow, and are then jettisoned, the shipowner will be liable for such a jettison as a breach of his contract to carry safely (*x*).

Case 1.—F. shipped in A.'s ship twenty-six pieces of timber. There was a custom in the timber trade to carry lumber on deck. F.'s goods were placed on deck, and were properly jettisoned. *Held*, that F. was entitled to a general average contribution from ship and freight: *semble*, also from cargo (*y*).

Case 2.—C. F. shipped in A.'s ship a full cargo of timber, under a charter whereby C. F. was to provide "a full cargo of timber, including a deck-load." On the voyage the timber on deck was properly jettisoned. *Held*, C. F. was entitled to recover a contribution to his loss from A. (*z*).

Case 3.—F. shipped cattle on A.'s ship, agreeing they should be carried on deck: there were other owners of cargo. On the voyage the cattle were properly jettisoned. *Held*, that F. was not entitled to a general average contribution either against A. or against the other cargo owners (*a*).

Case 4.—F. shipped timber on A.'s ship, which was not a general ship, under a charter, "the steamer shall be provided with a deck-load if required at full freight, but at merchant's risk." There was a custom to carry such timber on deck: on the voyage the deck timber was properly jettisoned. *Held*, that F. was entitled to a general average contribution from A. (*b*).

Case 5.—Cotton was shipped by F., under bills of lading, excepting "jettison" and "stranding." Some of the cotton was

(*t*) *Johnson v. Chapman* (1865), 19 C. B. N. S. 563; discussed in *Wright v. Marwood* (1881), 7 Q. B. D. at p. 69.

(*u*) *Burton v. English* (*vide supra*), at p. 220; but see *Mitchell v. L. & Y. Ry. Co.* (1875), L. R. 10 Q. B. 256; and see Articles 95, 107. See also *Wade v. Cockerline* (1904), 10 Com. Cas. 47, 115.

(*x*) *Royal Exchange S.S. Co. v. Dixon* (1886), 12 App. C. 11; *Newall v. Royal Exchange Steamship Co.* (1885), 33 W. R. 868; see also *per Lush, L.J.*, in *Schmidt v. Royal Mail Co.* (1876), 45 L. J. Q. B. 646, at p. 648.

(*y*) *Gould v. Oliver* (1837), 4 Bing. N. C. 134.

(*z*) *Johnson v. Chapman* (1865), 19 C. B. N. S. 563.

(*a*) *Wright v. Marwood* (1881), 7 Q. B. D. 62.

(*b*) *Burton v. English* (1883), 12 Q. B. D. 218.

stowed on deck; the ship stranded, and the deck cotton was properly jettisoned. An attempt to prove a custom to stow on deck failed. *Held*, that the cargo owner was entitled to recover the full value of the cotton from the shipowner (c).

Article 111.—Cargo damaged by Fire, directly or indirectly.

Damage to the cargo by pouring water on it (d), or by scuttling the ship to extinguish fire, or by burning it as fuel for the engines to avert the loss of ship and cargo (e), gives rise to a claim for general average contribution by the owner of the cargo destroyed or damaged (f). There must be a real fire: damage done by pouring in water when the captain thinks there is fire, when in fact there is none, however reasonable his belief, is not the subject of contribution (g).

Case.—F. had shipped wire on board the *S.* to be carried to Z. The *S.* arrived, and proceeded to discharge her cargo; about 100 tons remained on board, including the plaintiff's wire, when a fire broke out, which was extinguished by pouring water into the hold, whereby the wire was damaged. *Held*, that F. was entitled to a general average contribution from the owner of the *S.* (f).

(c) *Royal Exchange Steamship Co. v. Dixon* (1886), 12 App. C. 11.

(d) *Papayanni v. Grampian S.S. Co.* (1896), 1 Com. Cases, 448.

(e) *Walford v. Galindez* (1897), 2 Com. Cases, 137. If the ship was insufficiently supplied with fuel at starting, the owner of the cargo burnt will be entitled, in the absence of appropriate exceptions in the contract of affreightment, to recover its full value from the shipowner, while in consequence other owners of cargo will not be liable to contribute to general average: *Robinson v. Price* (1876), 2 Q. B. D. 91, 295; *The Vortigern*, (1899) P. 140.

(f) *Whitecross Wire Co. v. Savill* (1882), 8 Q. B. D. 653; in which the Court of Appeal for the first time decided this question, which they had left undecided in *Stewart v. West India S.S. Co.* (1873), L. R. 8 Q. B. 362. See also *Achard v. Ring* (1874), 31 L. T. 647. An exception "fire on board" in the bill of lading will not relieve the owner from liability for general average contribution to the owner of goods damaged by water used in extinguishing such fire: *Schmidt v. Royal Mail S.S. Co.* (1876), 45 L. J. Q. B. 646; *Greenshields v. Stephens*, (1908) App. Cas. 431.

(g) *Watson v. Firemen's Fund Co.*, (1922) 2 K. B. 355

Article 112.—Sale of Cargo, or other Sacrifice of its Value.

Sale of part of⁽ⁱ⁾ the cargo to furnish money for repairs to enable the ship to prosecute the voyage (*h*) or to release the master from arrest that he may prosecute the voyage (*i*), will only give rise to a claim for general average against the rest of the cargo, if such cargo can be carried on in no other way, and it is more beneficial to the cargo to be carried on than to stay where it is (*h*): any other kind of sale will only give rise to a personal claim against the shipowner (*k*).

The value of a cargo may be sacrificed in whole or part in other ways, *e.g.* where putting into a port of refuge renders it illegal to land the cargo at its port of destination, as in the case of cattle touching at an infected port. The loss of value due to such a sacrifice is made good in general average (*l*).

Article 113.—Sacrifice of Ship, Machinery, or Tackle.

Sacrifice of ship, machinery, or tackle, necessary for the safety of the whole adventure, and not incurred in carrying out the shipowner's original contract, will give rise to a general average contribution (*m*), unless:—

(*h*) *Hallett v. Wigram* (1850), 9 C. B. 580.

(*i*) *Dobson v. Wilson* (1813), 3 Camp. 480.

(*k*) *Hopper v. Burness* (1876), 1 C. P. D. 137; in which the payment of freight on cargo thus sold is discussed; and see Article 104, on master's power of raising money on cargo.

(*l*) *Anglo-Argentine Co. v. Temperley*, (1899) 2 Q. B. 403.

(*m*) *Birkley v. Presgrave* (1801), 1 East, 220; *Price v. Noble* (1811), 4 Taunt. 123; *Wilson v. Bank of Victoria* (1867), L. R. 2 Q. B. 203. Tipping the ship by the head, in order to repair the propeller, whereby water damaged the cargo, has been held a general average sacrifice: *McCall v. Houlder* (1897), 2 Com. Cases, 129. So also intentionally damaging the engines by working them to get a ship off is a general average sacrifice: *The Bona*, (1895) P. 125 (C. A.). As to calculation of the amount of general average sacrifice where it follows previous damage, and the ship becomes a constructive total loss, see *Henderson v. Shankland*, (1896) 1 Q. B. 525 (C. A.).

- (1) The thing sacrificed was at the time in such a condition that it would have been certainly lost, even if the rest of the adventure was saved, as when a mast is cut away, which is either certain to go overboard, or has already gone overboard and is hanging as a wreck (*n*),—or:—
- (2.) The sacrifice was rendered necessary by the original default of the shipowner, as in providing a ship insufficiently equipped (*o*), in which case he must bear all the loss.

Damage done to a ship by a voluntary and intentional stranding, or by knowingly causing her to come into collision, in avoiding a common peril, may be a general average sacrifice of the ship (*p*).

Case 1.—A ship sailed well equipped, having a donkey-engine, and a sufficient supply of coal for all purposes other than pumping purposes; she met with heavy weather and leaked considerably; the donkey-engine was used to pump, and it was only by this steam pumping that the leak was kept under; the coal ran short; and some of the spare spars and cargo were used for fuel. *Held*, that the sacrifice of the spars and cargo was a general average loss (*q*).

Case 2.—A ship ran aground and was in danger. The engines were intentionally worked to get her off, at the risk of straining them, and they were strained. *Held*, that the damage to the engines and the coal consumed were subjects of general average contribution (*r*).

Case 3.—A sailing ship, with auxiliary screw, was damaged by perils of the sea, so that practically she had lost all power of sailing; instead of repairing her sailing gear, she proceeded with her voyage under steam alone, at a very heavy expenditure in coals. *Held*, that such expenditure did not give rise to a general average contribution (*s*).

Case 4.—A ship met with a storm which caused part of the rigging to give way; the mainmast in consequence began to lurch, and was cut away by the captain's orders; if it had not been cut

(*n*) *Shepherd v. Kottgen* (1877), 2 C. P. D. 585. See *Cory v. Coulthard* (1877), 2 C. P. D. at pp. 583, 584.

(*o*) See *Robinson v. Price* (1877), 2 Q. B. D. 91, at p. 95; *Wilson v. Bank of Victoria* (1867), L. R. 2 Q. B. 203; *The Vortigern*, (1899), P. 140.

(*p*) *Austin Friars Co. v. Spillers & Bakers*, (1915) 3 K. B. 586.

(*q*) *Robinson v. Price* (1877), 2 Q. B. D. 91, 295.

(*r*) *The Bona*, (1895) P. 125.

(*s*) *Wilson v. Bank of Victoria*, *vide supra*.

away, it would have gone overboard very shortly, at great risk to the ship. *Held*, that the cutting away of the mast, then practically worthless, did not give rise to a claim for general average contribution₁(t).

Article 114.—Sacrifice of Freight.

Sacrifice of freight by the shipowner, by an act whereby the cargo is preserved, gives rise to a general average contribution against the cargo (u).

The freight to be considered is the bill of lading, not the chartered freight (x).

Case 1.—F. shipped coal on A.'s ship to be carried to Z.; on the voyage the coal took fire by spontaneous combustion; the ship and cargo were in immediate danger of total destruction by fire; but, by jettison of cargo, and pouring water on it, and discharging it at Y., the ship and a large portion of the cargo were saved from destruction. It was found impossible to carry the cargo to its destination, and it was accordingly sold at Y. By reason of such measures, the ship was prevented from earning her freight by delivering at Z. *Held*, that the shipowner was entitled to a general average contribution from the cargo on account of the freight thus lost (y).

Case 2.—A cargo of coals became so heated that it was impossible to carry it with safety to its destination. The master accordingly put into a port of refuge and discharged the coal, which was sold. *Held*, there was no general average, or any sacrifice of freight (z).

(t) *Shepherd v. Kottgen* (1877), 2 C. P. D. 585.

(u) *Pirie v. Middle Dock Co.* (1881), 44 L. T. 426. It was also suggested that the cargo was not entitled to general average contribution from the ship: (1) because the loss arose from vice in the cargo (as to which see *Greenshields v. Stephens*, (1908), A. C. 431); (2) because there was really no loss, the cargo selling for more at Y. than it would have realised after paying freight at Z. The case is discussed by Bigham, J., in *Iredale v. China Traders Co.*, (1899), 2 Q. B. 356.

(x) Cf. *The Leitrim*, (1902) P. 256. Loss of time is not made good either as demurrage on ship, loss of interest on cargo, or loss of time freight by charterer.

(y) *Pirie v. Middle Dock Co.* (*ubi supra*).

(z) *Iredale v. China Traders Co.*, (1900) 2 Q. B. 515. The principle of this case is that of *Shepherd v. Kottgen*, *vide supra*.

Article 115.—Extraordinary Expenditure by Shipowner.

Extraordinary expenditure voluntarily incurred, or extraordinary loss of time and labour voluntarily accepted, may also give rise to a general average contribution, provided that in each case the sacrifice is made for the common safety in a time of danger (*a*). But the expense must be both extraordinary and incurred to avoid a common peril (*b*).

Such general average contribution must cover not only the voluntary sacrifice, but also expenses directly caused by, or in consequence of, the voluntary sacrifice (*a*).

Thus, when the cargo has been placed in safety, it will not be liable to contribute to expense afterwards incurred by the shipowner for the purposes of earning his freight, as in getting off a stranded vessel (*c*), or making arrangements for the further carrying of the cargo in his own vessel, under circumstances when the cargo might have stayed where it was, or have been carried on by other vessels, with equal advantage (*d*). But expenses incurred by the shipowner or his agents, as agents of the cargo owner or in the sole interests of the cargo, in preserving the cargo, must be borne by the cargo (*e*).

(*a*) *Per* Bowen, L.J., *Svendsen v. Wallace* (1884), 13 Q. B. D. at pp. 84, 85. See also *per* Lawrence, J., in *Birkley v. Presgrave* (1801), 1 East, 220. The sentence in the text is in the words of Bowen, L.J. It is not quite clear what he meant by "extraordinary loss of time," as to which see foot-note (*x*) *supra*.

(*b*) *Cf.* *Société Nouvelle v. Spillers*, (1917) 1 K. B. 865.

(*c*) *Walthew v. Mavrojan* (1870), L. R. 5 Ex. 116; *Job v. Langton* (1856), 6 E. & B. 779; *Royal Mail Co. v. Bank of Rio* (1887), 19 Q. B. D. 362.

(*d*) *Schuster v. Fletcher* (1878), 3 Q. B. D. 418. For circumstances in which the shipowner may make such charges, see *Rose v. Bank of Australasia*, (1894) A. C. 687, in which *Schuster v. Fletcher* (*v. s.*) was disapproved.

(*e*) See *per* M. Smith, J., and Hannen, J., in *Walthew v. Mavrojan* (*v. s.*), at pp. 125, 126. M. Smith, J., suggests the case of "perishable goods landed on a desert island in a distant and unfrequented part of the world." *Semble*, that this is not general average but that, the original venture being at an end, the cargo owner must bear the whole expense: see *Cargo ex Argos* (1872), L. R. 5 P. C. 134. Forwarding for the purpose of earning freight only must be paid for by the shipowner. *Cf. Schuster v. Fletcher, v. s.*

Article 116.—Expenses in Port of Refuge.

Where a ship on her voyage runs into a port of refuge to repair a general average sacrifice, such as cutting away a mast, the expenses of repairing the sacrifice, of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage with other charges on the vessel on leaving port, are also the subject of general average (f).

The amount of liability to a third party, incurred as the natural consequence of a general average act, is to be treated as general average expenditure. Thus if, in time of common peril, the ship is run into a dock to preserve her from sinking, and in doing so the risk of injuring the dock wall is intentionally and knowingly incurred, the liability of the shipowner to the dock owner for the injury done is a subject of general average contribution (g).

Where a ship on her voyage, in consequence of damage not the subject of a general average contribution, such as springing a leak, puts into a port of refuge, and, in order to repair the ship, the cargo is necessarily landed, the expenses of reloading the cargo to enable the ship to prosecute her voyage are not the subject of a general average contribution from the cargo (h), nor is damage to the cargo sustained in discharging it, the cargo being in no danger, in order to repair the ship (i).

Seem, that in principle the expenses of unloading the cargo will or will not be the subject of general average,

(f) *Atwood v. Sellar* (1880), 5 Q. B. D. 286. See also *Plummer v. Wildman* (1815), 3 M. & S. 482, as explained in *Svendsen v. Wallace* (1885), 13 Q. B. D. at p. 91; *Hallett v. Wigram* (1850), 9 C. B. 580.

(g) *Austin Friars Co. v. Spillers & Bakers*, (1915) 3 K. B. 586.

(h) *Svendsen v. Wallace* (1885), 10 App. C. 404; 13 Q. B. D. 69. See also *Power v. Whitmore* (1815), 4 M. & S. 141; *Hallett v. Wigram*, v. s.; *Walthev v. Mavrojan* (1870), L. R. 5 Ex. 116.

(i) *Hamel v. P. & O. Co.*, (1908) 2 K. B. 298.

according as the cargo is not or is safe in the ship without removal (*k*).

Semble, that the expenses of warehousing the cargo are to be borne by the cargo (*h*).

Semble, that pilotage expenses and port dues out are not the subject of general average (*l*).

Note.—The distinction in fact between *Atwood v. Sellar* (*m*), and *Svendson v. Wallace* (*n*), is that in the first case the ship put into port to repair a general average sacrifice; in the second to repair a particular average loss, or one liable to be borne by the ship alone (*o*); though such putting into port is probably a general average sacrifice in itself. The difference in principle is not clear, and seems to be rather a question of the continuity of the transaction, unloading the cargo not being a necessary consequence of putting into port, which was the general average sacrifice in *Svendson v. Wallace*; though it is of the voluntary sacrifice of the ship, which was the general average act in *Atwood v. Sellar*. But it is impossible to feel that the present position of *Atwood v. Sellar* is satisfactory as an authority. *Da Costa v. Newnham* (*p*) must be taken as overruled: and *Moran v. Jones* (*q*) as either overruled or limited to its own very special facts (*r*).

Article 117.—Master's Duty to collect General Average Contribution.

Where a general average loss has occurred on a voyage, the shipowner or master has the right to retain the cargo

(*k*) In practice they are charged as general average; but see *per* Brett, M.R., 13 Q. B. D. at p. 76; Bowen, L.J., 13 Q. B. D. at p. 88; Lord Blackburn, 10 App. C. at p. 414.

(*l*) So *per* majority of C. A. in *Svendson v. Wallace*, *vide supra*.

(*m*) (1880), 5 Q. B. D. 286.

(*n*) (1885), 10 App. C. 404.

(*o*) *Jackson v. Charnock* (1800), 8 T. R. 509; *Hallett v. Wigram* (1850), 9 C. B. 580.

(*p*) (1788), 2 T. R. 407. See *per* Brett, M.R., 13 Q. B. D. 80; Bowen, L.J., p. 90.

(*q*) (1857), 7 E. & B. 523. See *per* Brett, M.R., at 13 Q. B. D. p. 80; Bowen, L.J., at p. 93. See also 19 Q. B. D. 371, 377.

(*r*) The practice of English adjusters will be found in the Rules of Practice of the Association of Average Adjusters printed in the Annual Reports of the Association. See also *The York-Antwerp Rules*, 1890, Appendix IV.

until he is paid or tendered the amount due on it for general average (s); he is under a duty to persons entitled to a general average contribution from the cargo to do, and is liable to an action if he omits to do so (t).

It is also the duty of the master to furnish to all cargo owners all the accounts and particulars necessary for adjusting general average (u). If he omits to do so, the cargo owner who fails to tender a sufficient sum in consequence of such omission, is not liable for such failure (x).

If he does furnish such particulars, the cargo owner must either pay the sum demanded, or tender the right sum, at his peril (x).

If, as in practice, the master demands a particular security (y) for the payment by the cargo owner of the amount found on adjustment to be due, such security must be a reasonable one (z).

Case.—A., shipowners, had a lien on cargo in their ship, for general average. They required the cargo owner to make a deposit of 10 per cent. on the value of the goods in the name of

(s) See *per* Lord Esher and Lindley, L.J., in *Huth v. Lamport* (1886), 16 Q. B. D. 735; *Simmonds v. White* (1824), 2 B. & C. 805, at p. 811. For a clause exempting the goods from lien, but making the shippers liable, see *Walford v. Galindez* (1897), 2 Com. Cases, 137.

(t) *Strang v. Scott* (1889), 14 App. C. at p. 606; *Crooks v. Allan* (1879), 5 Q. B. D. 38; *Nobel's Explosives v. Rea* (1897), 2 Com. Cases, 293. *Hallett v. Bousfield* (1811), 18 Ves. 187, is now of doubtful authority, see 14 App. C. 606. Some bills of lading exempt the master from this duty, e.g., "shipowner not to be bound to exercise his lien on cargo for general average contribution." The master is under no duty to persons entitled to salvage from the cargo to detain it until he obtains a bond from the cargo owners to pay such salvage: *The Raisyby* (1885), 10 P. D. 114, and Article 121.

(u) *Huth v. Lamport*, *vide supra*; and see *The Norway* (1864), B. & L. at p. 397.

(x) See *per* Lord Esher and Lindley, L.J., in *Huth v. Lamport* (1886), 16 Q. B. D. 735; *Simmonds v. White* (1824), 2 B. & C. 805.

(y) *Semble*, that if the master obtains from the cargo owners the form of security usual at the port of discharge he will be protected: *Simmonds v. White* (1824), 2 B. & C. 805; *The Raisyby* (1885), 10 P. D. 114.

(z) *Huth v. Lamport* (1886), 16 Q. B. D. 735. The clause in some bills of lading, "In case of average, a deposit sufficient to cover the estimated contribution to be paid at port of discharge if so required by the master," seems both unnecessary and unworkable. The master has his lien without it, and the method of "estimating," which is the difficulty, is not provided for.

A., or B., his average adjuster, or A. and B.; and to execute a bond, the "Liverpool Bond," providing that such deposit should be a security for general average, and that the persons in whose name it stood might pay out from time to time such sums as they thought right to A. or his master on account of their disbursements. "All questions of general average to be adjusted by B., with appeal to arbitrators whose decision was final." *Held*, that such a requirement was unreasonable, and its continued demand released the cargo owner from the necessity of tendering (a).

Article 118.—Who can sue for General Average Contribution.

I. The shipowner, or the charterer, if the charter amounts to a demise: they have also a possessory lien on the cargo for the general average contribution due from it (b).

II. The cargo owner, who can sue another cargo owner (c), the shipowner, or the person entitled to the freight, for general average contribution due from them. He has not after adjustment a maritime lien on the ship for the contribution due from it, nor will such a personal debt support a bottomry bond on the ship given in a subsequent voyage (d).

III. The person entitled to the freight, for contributions due from the other interests in the adventure (e).

Article 119.—Who can be Sued for General Average Contribution.

There are liable for general average contribution:—

I. The shipowner, for that due from the ship (unless she is under a charter amounting to a demise, in which

(a) *Huth v. Lamport (ubi supra)*.

(b) See Articles 117, 149.

(c) *Strang v. Scott* (1889), 14 App. C. 601; *Dobson v. Wilson* (1813), 3 Camp. 480.

(d) *The North Star* (1860), Lush. 45; *quære*, whether a lien for general average by foreign law will support a bond.

(e) *Pirie v. Middle Dock Co.* (1881), 44 L. T. 426.

case the charterer is liable), and from the chartered freight (*f*).

II. The charterer, for that due from the ship, if the charter amounts to a demise, and in respect of his interest in bill of lading freights (*g*).

III. The cargo owner.

IV. A consignee of cargo who has taken delivery of the goods under a bill of lading is not liable for general average, unless:—

- (a.) He is the owner of the goods; or
- (b.) The bill of lading under which he takes the goods stipulates that he shall pay average; or
- (c.) He has notice from the master of his lien for average, and after that takes the goods (*h*).

V. The shipper, though the property in the goods has passed from him, may be liable under special clauses in the bill of lading (*i*).

Article 120.—General Average Contribution, how adjusted.

In the absence of special agreement (*k*), the amount to be contributed in general average is adjusted when the voyage is terminated by the delivery of the goods or otherwise and according to the law of the place of

(*f*) As to the liability of chartered freight on a round voyage, see *Williams v. London Assurance Co.* (1813), 1 M. & S. 318; *Carisbrook Co. v. London and Provincial Co.*, (1902) 2 K. B. 681.

(*g*) See *The Leitrim*, (1902) P. 256; and Lowndes on General Average, 6th ed., sect. 73.

(*h*) *Scaife v. Tobin* (1832), 3 B. & Ad. 523. He would not be liable if he merely had notice that the goods were liable for general average, but not that the master claimed a lien (*ibid.*).

(*i*) *Walford v. Galindez* (1897), 2 Com. Cases, 137.

(*k*) *E.g.*, "Average, if any, to be adjusted according to British custom," which makes the custom of English average adjusters, though contrary to the law, part of the contract, *Stewart v. West India Co.* (1873), L. R. 8 Q. B. 362. A very usual clause is, "Average to be adjusted according to York-Antwerp rules," referring to a code of rules settled and adopted by a series of international conferences, including one at York in 1864, one at Antwerp in 1877, and one at Liverpool in 1890. See Appendix IV.

delivery (*l*). The fact that the voyage has been temporarily suspended, while the ship is repaired at a port of refuge, does not justify an average adjustment at such port (*m*).

If after the shipowner has incurred general average expenditure at a port of refuge both ship and cargo are lost while completing the voyage, the shipowner cannot claim contribution from the owners of cargo (*n*).

Article 121.—Salvage.

If cargo is saved from loss or damage on a voyage by persons other than those who have undertaken to carry it (*o*), the salvors are entitled to remuneration for their services, known as *salvage*.

No salvage is payable by cargo owners unless some cargo is saved, and it is payable proportionately to the cargo saved (*p*). Ship and cargo must each pay its own share of salvage; neither can be made liable for salvage due from the other without an express agreement to pay it (*q*), or unless the shipowner is liable to indemnify the cargo owner for such payment, which was caused by his breach of contract (*r*); but either or both, if saved, may be liable to pay salvage for life saved, though, if life is

(*l*) *Simmonds v. White* (1824), 2 B. & C. 805; *Dalglish v. Davidson* (1824), 5 D. & R. 6. The shipowner is under no obligation to employ an average stater at any particular place, or at all. He may make his own statement: *Wavertree S.S. Co. v. Love*, (1897) A. C. 373.

(*m*) *Hill v. Wilson* (1879), 4 C. P. D. 329; see also *Fletcher v. Alexander* (1868), L. R. 3 C. P. 375; *Mavro v. Ocean Insurance Co.* (1875), L. R. 10 C. P. 414.

(*n*) So held by Sankey, J., as matter of the common law. *Chellew v. Royal Commission*, (1921) 2 K. B. 627. In the C.A. the decision was affirmed only on the effect of the York-Antwerp Rules, (1922) 1 K. B. 12.

(*o*) This includes a King's ship, if the services rendered are beyond the scope of her public duty: *The Cargo ex Ulysses* (1888), 13 P. D. 205.

(*p*) *The Longford* (1881), 6 P. D. 60.

(*q*) *The Pyrennee* (1863), B. & L. 189; *The Raisby* (1885), 10 P. D. 114; a case of an agreement to save, and not an agreement to pay a particular sum for salvage. For instances of such express agreement, see *The Prinz Heinrich* (1888), 13 P. D. 31; *The Cambrian* (1887), 57 L. T. 205.

(*r*) *Scaramanga v. Marquand* (1886), 53 L. T. 810; *Duncan v. Dundee Shipping Co.* (1878), 5 Sc. Sess. C., 4th Ser. p. 742.

saved, but not cargo or ship, the cargo owner or ship-owner will not be liable to pay life salvage (*s*).

The authority of the master to bind the cargo to pay salvage is derived from necessity and benefit to the cargo (*t*). It is no part of the duty of the master of the salvaged ship to protect the salvors by obtaining a bond from the cargo owners for their proportion of any salvage that may be due before allowing the cargo owners to take away their goods (*u*).

Where, however, the shipowners have paid, or made themselves personally liable to pay, a sum of money for the preservation of the ship and cargo, if such payment is justifiable, and did not result from the fault of the shipowners (*x*), they will have a lien on the cargo for the sum that they have justifiably paid (*y*); though the fact that they have *bonâ fide* and reasonably paid a certain sum, is not conclusive that that sum is the basis on which the liability of the cargo owners is to be reckoned (*z*).

The charterer of a vessel which renders salvage services is not entitled, in the absence of special clauses (*a*), to salvage for those services (*b*) unless the charter amounts to a demise, so that at the time of the salvage he is in possession of the vessel (*c*).

(*s*) *The Renpor* (1883), 8 P. D. 115; *The Mariposa*, (1896) P. 273; *Cargo ex Sarpedon* (1877), 3 P. D. 28; *The Fusilier* (1865), 3 Moore, P. C. N. S. 51. In *The Annie* (1886), 12 P. D. 50, the ship was raised, but sold for less than the cost of raising her, and it was held that there was nothing to which a claim for life salvage could attach.

(*t*) *The Renpor* (1883), 8 P. D. at p. 118.

(*u*) *The Raisby* (1885), 10 P. D. 114.

(*x*) *The Ettrick* (1881), 6 P. D. 127.

(*y*) *Briggs v. Merchant Traders' Co.* (1849), 13 Q. B. 167; *Cox v. May* (1815), 4 M. & S. 152.

(*z*) *Anderson, Tritton & Co. v. Ocean S.S. Co.* (1884), 10 App. C. 107. For the conditions rendering a salvage agreement void, see *The Rialto*, (1891) P. 175; *The Mark Lane* (1890), 15 P. D. 135.

(*a*) For such a special clause, held to divide equally the net profit on the salvage operations, see *Booker v. Pocklington*, (1899), 2 Q. B. 690.

(*b*) *The Collier* (1866), L. R. 1 A. & E. 83; *The Waterloo* (1820), 2 Dods. 433; *The Alfen* (1857), Swabey, 189. The charterer may have a claim against the owner for delay or deviation in rendering the salvage: *The Alfen*, *vide supra*.

(*c*) *The Maria Jane* (1850), 14 Jur. 857; *The Scout* (1872), L. R. 3 A. & E. 512; *Elliott Tug Co. v. Admiralty*, (1921) 1. A. C. 137, and Article 2.

Case.—The *R.*, owned by A., rendered salvage services to the *S.*, owned by K., and chartered to A., the charter not amounting to a demise. *Held*, that A. was entitled to salvage from the *S.* (b).

Article 122.—Collision.

The cargo laden on board a vessel at the time of collision cannot be sued in the Admiralty Court for the damage (d) even though it belongs to the owner of the ship, or to the charterer under a charter amounting to a demise (e).

The owner of cargo on board a ship sued for collision can only be compelled to pay into court the amount of freight due from him to the shipowner (f).

The owner of a cargo lost by a collision in which both ships are in fault may of course recover his whole loss against the owner of the ship that is carrying his cargo, unless prevented by exceptions in the bill of lading. But he may make an alternative claim against the stranger ship (g), in which case before December, 1911, he would have recovered half his loss against the stranger ship and half against the carrying ship (h), and since December, 1911, he can recover his loss against the two ships in the proportions in which they have been found to be in fault (i). If the stranger ship is alone in fault, he may either recover the whole loss against her, or he may recover it from the carrying ship, unless prevented by exceptions in the contract of affreightment (k); if the

(d) *The Victor* (1860), Lush. 72; *The Leo* (1862), Lush. 444.

(e) If it were a demise, the charterer would be liable for collision caused by negligence of the chartered ship: *Fenton v. Dublin S.S. Co.* (1838) 8 A. & E. 835.

(f) *The Leo* (1862), Lush. 444; *The Flora* (1866), L. R. 1 A. & E. 45.

(g) *Thorogood v. Bryan* (1842), 8 C. B. 115, to the contrary, is now overruled by *The Bernina* (1887), 13 App. C. 1.

(h) *The Milan* (1861), Lush. 388. Cf. *Chartered Merc. Bank v. Netherlands Co.* (1883), 10 Q. B. D. 521.

(i) Under the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57).

(k) As he almost certainly would be under the exception of perils of the seas: *The Xantho* (1887), 12 App. C. 503.

carrying ship alone is at fault, he may recover the whole loss from her unless prevented by exceptions in the contract of affreightment (1).

(1) See *The Xantho* (1887), 12 App. C. 503, and Articles 83, 84, *ante*. On the liability of a ship *in rem* for a collision, where the charter amounts to a demise, see *The Tasmania* (1888), 13 P. D. 110, and Article 2.

SECTION VIII.

PERFORMANCE OF CONTRACT: UNLOADING.

Article 123.—Unloading under a Charter.

At the port of discharge it is the duty of the master to proceed to the place of discharge provided by the contract of affreightment (*a*), and the shipowner may be restrained by injunction from discharging cargo in a place not so agreed to (*b*). Apart from special provisions, it is the duty of the shipowner to get the goods out of the ship's hold and put them on the ship's deck or alongside (*c*): but the duty of providing, and making proper use of, sufficient means for the discharge of the cargo, when it has been got up out of the hold, lies in general upon the charterer (*d*). In the absence of any limitations by the terms of the charter or bill of lading, the charterers or consignees must take delivery at the time and under the conditions stated in the following articles, and must take delivery continuously in ordinary working hours from that time (*e*).

This duty must be fulfilled when:—

- (1.) The ship is at the place where the carrying voyage is to end (*c*). (Articles 34—39.)

(a) See Article 38.

(b) *Wood v. Atlantic Transport Co.* (1900), 5 Com. C. 121.

(c) *Ballantyne v. Paton* (1912), Sess. Cas. 246. The shipowner is not in the absence of a custom of the port bound to separate cargoes which have been loaded in bulk, *e.g.*, bones, horns, piths and hoofs mixed: *Clacevitch v. Hutcheson* (1887), 15 Sc. Sess. C., 4th Ser. 11. For the custom of London as to timber, see *Aktieselskab Helios v. Ekman*, (1897) 2 Q. B. 83 (C. A.), and Article 43; and see, as to Liverpool, *Cardiff S.S. Co. v. Jamieson* (1903), 19 Times L. R. 159.

(d) *Per* Lord Selborne in *Postlethwaite v. Freeland* (1880), 5 A. C. at p. 608; *per* Lord Esher in *Nelson v. Dahl* (1879), 12 Ch. D. at p. 583.

(e) *Zillah v. Midland Ry. Co.* (1903), 19 Times L. R. 63.

Neither the master nor any agent of the shipowner is entitled to demand of the consignee before the ship's arrival, whether he will receive the goods consigned to him. A refusal to perform the contract made before the ship's arrival is not necessarily a breach of the contract, unless it is accepted as such by the shipowner, or is still unretracted at the time of the ship's arrival, in which case it is a continuing refusal amounting to a breach of the contract (*f*).

(2.) She is ready to discharge (*g*).

[Notice to the charterer of the above facts is not necessary, but when they are fulfilled the lay-days allowed for discharging begin. (Article 124) (*h*).]

Article 124.—Notice of Readiness to discharge not required.

In the absence of special contract (*i*) or custom (*j*), the shipowner is not bound to give notice of his readiness to unload either to the charterers or to shippers or consignees under bills of lading (*k*).

(*f*) *Ripley v. M'Clure* (1849), 4 Ex. 345, as modified and explained by *Hochster v. De la Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1872), L. R. 5 Ex. 322; which cases are discussed in *Johnstone v. Milling* (1886), 16 Q. B. D. 460. See *Mersey Steel Co. v. Naylor Benzon* (1884), 9 App. C. 434, at pp. 438, 439.

(*g*) See note (*c*), p. 324, *supra*; and *Armement A. Deppe v. Robinson*, (1917) 2 K. B. 204.

(*h*) As to the time when the ship's responsibility ends, see *British Shipowners' Co. v. Grimon* (1876), 3 Sc. Sess. Cases, 4th Ser. 968; *Knight S.S. Co. v. Fleming* (1898), 25 R. (Sess. Cas.) 1070; *The Jaederen*, (1892) P., *per* Barnes, J., at p. 358, and Article 127, Note 4, *post*, p. 337.

(*i*) In through bills of lading from the United States there commonly appears, "Party to be notified——." Where the name of the consignee is inserted in this space there is an obligation upon the shipowner to give notice to him of the arrival of the goods: *E. Clemens Horst Co. v. Norfolk, &c. Co.* (1906), 11 Com. Cas. 141.

(*j*) *Cf.* sect. 11 of the Canadian Water Carriage of Goods Act, 1910, *infra*, p. 494.

(*k*) *Harman v. Mant* (1815), 4 Camp. 161; *Harman v. Clarke* (1815), 4 Camp. 159; *Nelson v. Dahl* (1879), *per* Brett, L.J., 12 Ch. D. at p. 583; and *cf.* *Major v. Grant* (1902), 7 Com. C. 231.

If, however, the shipowner's wrongful act or omission has prevented the charterer or consignee from learning by reasonable diligence of the ship's readiness to unload, he will to that extent be discharged (*l*).

Case 1.—A ship carried goods under a bill of lading, "to be taken out in fourteen days after arrival, or to pay 10s. a day demurrage." The ship was ready to deliver on October 3, but the goods were not landed till October 29. The consignees pleaded: (1) no notice of arrival: *Held*, unnecessary (*m*); (2) that the ship was wrongly entered in the custom-house as *Die Treue* instead of *The Treue*: *Held*, that an entry by the shipowner so inaccurate as to mislead a person using reasonable diligence, would have relieved the consignee from liability for demurrage; but that it was not proved here that reasonable diligence had been used, and that therefore the consignees were liable (*n*).

Case 2.—Under a charter: "the ship to be addressed to charterers' agents free of commission," the ship, in breach of the charter, was addressed by the shipowners to other agents, who gave no notice to consignees, whereby the latter were sued for demurrage. It being proved that the charterer's agent would have given such notice: *Held*, that the shipowner could not claim demurrage, the liability to which arose from his own breach of contract (*o*).

Unloading according to custom of port of discharge, see Articles 45 and 133.

Demurrage in unloading, see Section IX.

Article 125.—Duty of Master as to Delivery at Port of Discharge.

In the absence of statutory provisions (*p*), customs of the port of discharge (*q*), or express stipulations in the

(*l*) *Houlder v. General Steam Navigation Co.* (1862), 3 F. & F. 170; *Bradley v. Goddard* (1863), 3 F. & F. 638; *Harman v. Clarke*, *vide supra*.

(*m*) In *Houlder v. General Steam Navigation Co.*, *vide supra*, an attempt to prove a custom to give notice to consignees failed.

(*n*) *Harman v. Clarke*, *vide supra*.

(*o*) *Bradley v. Goddard* (1863), 3 F. & F. 638; and see p. 149, note (*k*).

(*p*) Such as Merchant Shipping Act, 1894, ss. 492-501; Article 127, and Appendix III.

(*q*) In London, for example, delivery to the dock authority is, as regards the ship's liability, equivalent to delivery to the consignee:

charter or bill of lading, the master on the arrival of the ship at its destination must allow the consignee a reasonable time to receive the goods, and cannot discharge his liability by landing them immediately on the ship's arrival (*r*).

The holder of the bill of lading, who presents it at a reasonable time, is entitled, in the absence of custom to the contrary, to have the goods delivered to him direct from the ship, existing liens being satisfied. (*s*).

If a person claims the goods as entitled to them, but is unable to produce the bill of lading, the captain can, of course, deliver them to him on his giving security, or an indemnity, against possible adverse claims by others. In some cases it may be so reasonable for the shipowner to do this, that he cannot claim demurrage for delay resulting from his refusal to do it (*t*).

The shipowner or master is justified in delivering the goods to the first person who presents to him a bill of lading (*u*), making the goods deliverable to him, though that bill of lading is only one of a set, provided that he has no notice of any other claims to the goods, or knowledge of any other circumstances raising a reasonable suspicion that the claimant is not entitled to the

Petrocochino v. Bott (1874), L. R. 9 C. P. 355. Cf. *Grange v. Taylor* (1904), 9 Com. Cas. 223, where the bills of lading were for undivided portions of a bulk cargo, the whole of which was delivered to the Dock Company, and the shipowner was held under no obligation to divide up the portions correctly. Cf. *P. & O. Co. v. Leatham* (1915), 32 T. L. R. 153, as to a custom of Hull.

(*r*) *Bourne v. Gatliff* (1844), 11 Cl. & Fin. 45, at p. 70. This article will apply to all ports where there are statutory regulations or customs of the port; for an English port without customs, see *Fowler v. Knoop* (1879), 4 Q. B. D. 299.

(*s*) *Erichsen v. Barkworth* (1858), 3 H. & N. 601, at p. 616.

(*t*) *Carlberg v. Wemyss Co.* (1915), Sess. Cas. 616.

(*u*) If he delivers without having the bill of lading produced (e.g., to the consignee named in the captain's copy) he of course runs the risk of being liable to some holder of the bill of lading by assignment or pledge from the consignee. Cf. *London Joint Stock Bank v. Amsterdam Co.* (1910), 16 Com. Cas. 102. Therefore in any such case he should take a sufficient indemnity, or security, from the person to whom he delivers without production of the bill of lading.

goods (*x*). If he has any such notice or knowledge he must deliver at his peril to the rightful owner (*y*), or must interplead (*z*). He is not entitled to deliver to the consignee named in the bill of lading, without the production of the bill of lading, and does so at his risk if the consignee is not in fact entitled to the goods (*a*).

Such delivery by the master will not affect the property in the goods, so as to confer any better right on the claimant than he originally had, as against persons claiming on another bill of lading of the set (*b*).

Semble, that a warehouseman, with whom the goods have been warehoused under statutory powers, is in the same position as the shipowner as to the delivery of the goods (*c*).

Case.—Goods were shipped and consigned to G. to be delivered in Z. under three bills of lading marked First, Second, Third, respectively. G. indorsed the bill of lading marked "First" to a bank as security for a loan. On the arrival of the goods at Z. they were landed into warehouses by the master, under a stop for freight due on them. G. produced to the warehouseman the bill marked "Second," unindorsed, and was entered in their books as the owner. G. then paid the freight, and gave a delivery order to P., to whom the warehouseman delivered *bonâ fide* and without knowledge of the bank's claim. *Held*, that the warehouseman was not liable to the bank for wrongful delivery of the goods (*d*).

(*x*) *Glyn, Mills & Co. v. East and West India Dock Co.* (1882), 7 App. C. 591; *The Tigris* (1863), B. & L. 38. See also *Caldwell v. Ball* (1786), 1 T. R. 205.

(*y*) In answer to a claim by the indorsee of a bill of lading the shipowner is entitled to plead that the shipper of the goods had no property in them and that therefore no property has passed to the indorsee: *Finlay v. Liverpool and G. W. Co.* (1870), 23 L. T. 161.

(*z*) *Per* Lord Blackburn, 7 App. C. at pp. 611, 614. The opinion in *Fearon v. Bowers* (1753), 1 H. Bl. 364, n., and any *dicta* approving it in *The Tigris*, *vide supra*, to the effect that the captain is not concerned to examine who had the better right on different bills of lading, are overruled by the principal case.

(*a*) *The Stettin* (1889), 14 P. D. 142.

(*b*) *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317.

(*c*) See *per* Lords Selborne and Cairns, 7 App. C. 597; Lord O'Hagan, p. 601; Lord Blackburn, pp. 609, 614; Lord Watson, p. 614; *contra*, *per* Lord FitzGerald, p. 617; and *per* Brett, L.J., 6 Q. B. D. 486.

(*d*) *Glyn, Mills & Co. v. East and West India Dock Co.* (1882), 7 App. C. 591.

Article 125A.—Goods of Different Owners mixed and Unidentifiable.—Delivery.

Where goods of one description, shipped under different bills of lading, become unidentifiable in the course of the voyage, and if this result has happened by reason, of excepted perils (so that the shipowner has a defence against the claim of any bill of lading holder for damages for his failure to deliver the actual goods shipped under that bill of lading), the owners of the goods so mixed become tenants in common of the whole of the mixed goods in the proportions in which they have severally contributed to that whole (*e*). It will therefore be the duty of the shipowner to deliver the indistinguishable goods, or their proceeds, to the various holders in proportion to the extent to which full delivery on each bill of lading remains unsatisfied by the delivery under it of its proper identifiable goods (*f*).

The shipowner may be relieved of this duty of apportioning the goods among the bill of lading holders by the provisions of the various bills of lading, or by the custom of the port as to discharge (*g*).

This principle has no application where various shipments become mixed and unidentifiable in the course of the voyage, but the shipowner on the terms of his contracts has no defence to a claim by any particular bill of lading holder that he has failed to deliver the specific goods shipped under the particular bill of lading (*h*).

Note 1.—It is not very easy to say how far, if at all, the principle of *Spence v. Union Marine Co.* (*i*) can survive the

(*e*) *Spence v. Union Marine Co.* (1868), L. R. 3 C. P. 427, following *Buckley v. Gross* (1863), 3 B. & S. 566, and *Jones v. Moore* (1841), 4 Y. & C. 351. Cf. Lord Russell of Killowen, L.C.J., *Smurthwaite v. Hannay*, (1894) App. Cas. 494, at p. 505.

(*f*) See Note 2 at end of this article.

(*g*) *Grange v. Taylor* (1904), 9 Com. Cas. 223; *Petrocochino v. Bott* (1874), L. R. 9 C. P. 355 (both as to London); *P. & O. Co. v. Leatham* (1915), 32 T. L. R. 153 (as to Hull).

(*h*) *Sandeman v. Tyzack & Branfoot Co.*, (1913) A. C. 680.

(*i*) (1868), L. R. 3 C. P. 427.

decision of the House of Lords in *Sandeman v. Tyzack* (k), but it is believed that the statements of the law in the text above are correct. In *Sandeman v. Tyzack* Lord Moulton (l) suggests that in any case the shipowner would be liable to any one of the bill of lading holders for damages for failure to deliver, but that if the bill of lading holder choose to avail himself, by the doctrine of *commixtio*, of the right to treat himself and the other bill of lading holders as tenants in common of the mixed mass, he must give credit for what he receives under that election against his claim against the shipowner for damages. This seems inapplicable to a case where the failure of the shipowner to deliver goods shipped under any particular bill of lading gives no claim for damages to the holder of that bill of lading, seeing that the failure is due to an excepted peril. In *Sandeman v. Tyzack* (k) the shipowner had no excepted peril on which he could rely, and he had no answer to the claim of a holder of a bill of lading for 500 bales marked J.P.S. etc. for failure to deliver those 500 bales. The *dicta* of Lord Moulton do not appear to be pertinent to the different case that would arise if excepted perils excused the failure to deliver the goods shipped under the bill of lading.

Note 2.—The statement in the text as to the principle of apportionment where the doctrine of *commixtio* applies is correct, and is of simple application, when the parcels of cargo shipped have all arrived at their destination. But where the position is complicated by a part of the whole cargo having been lost at sea, as well as by part arriving unidentifiable, difficult problems may arise. The difficulty is to determine in what proportions the various bill of lading holders have contributed to the bulk of unidentifiable goods. This would necessitate also the ascertainment of the proportions in which the various holders contributed to the amount of goods lost at sea.

The problem can obviously be solved only by making assumptions. One possible method would be to assume that the goods lost at sea were contributed by the various consignments in proportion to their original amounts when shipped. Another method would be to assume that the unmarked and unidentifiable bulk has been contributed by the various consignments in proportion to their original amounts when shipped. In *Spence v. Union Marine Co.* (*ubi supra*) there was a loss of part of the whole shipment at sea, and also an

(k) (1913) A. C. 680.

(l) *Ibid.* at p. 697.

arrival of unmarked and unidentifiable bales. The Court seems to have held that the amount paid in by the defendants was, in any case, enough, without going into the nice questions involved in ascertaining how much the plaintiffs had in fact lost. The headnote in the Law Reports (not apparently justified by the judgment) says, "All the owners became tenants in common of the cotton which arrived at Liverpool and could not be identified . . . the share of each owner's loss in the cotton totally lost . . . and his share in the remainder which arrived at Liverpool being in the proportion that the quantity shipped by him bore to the whole quantity shipped." This is to apply the two methods suggested above both at once, but this is impossible in almost every case. There is no necessary connection at all between the proportion of goods lost (assuming them to have been lost in the proportions of the original shipments) and the resulting proportion of unidentifiable goods.

There is, however, a principle upon which the same percentage can be applied both to the bales lost at sea and to the unidentifiable arrived bales, and can be applied in every case, viz. the share of each consignee's loss in the bales lost at sea, and equally his share in the unmarked arrived bales is in the proportion which the difference between the number of marked bales delivered to each consignee and the number of marked bales shipped to each consignee bears to the total of such differences for all the consignments (*m*). And this, it is submitted, should be the rule applied in such cases.

(*m*) Thus suppose A. ships 500 bales marked RS., and B. ships 100 bales marked MN. A.'s consignee has delivered to him 450 marked RS. B.'s consignee has delivered 10 marked MN. There have been lost at sea 100 bales (marks unknown), and there arrive 40 without marks and unidentifiable.

A. shipped 500 and has had delivered 450, i.e., 50 were in the 100 lost at sea, or are partly in the 40 unmarked. B. shipped 100 and has had delivered 10, i.e., 90 were in the 100 lost at sea, or are partly among the 40 unmarked. A. is short 50 and B. is short 90, i.e., 140 altogether. If 5-14ths of the 100 lost at sea were A.'s and 9-14ths were B.'s, then A. lost 35 $\frac{1}{2}$ and B. lost 64 $\frac{1}{2}$. There remain unaccounted for 14 $\frac{1}{2}$ of A.'s, i.e., 5-14ths of the 40 unmarked, and 25 $\frac{1}{2}$ of B.'s, i.e., 9-14ths of the 40 unmarked. If the headnote to *Spence v. Union Marine Co.* were applied to this case it would mean that 5-6ths of the 100 lost at sea came out of A.'s consignment, and 5-6ths of the 40 unmarked belong to A. But A. has only lost 50 altogether, either by loss at sea or by loss of marks!

Article 126.—The Master's Power to land or carry on the Goods at Common Law.

While the master is not, as a general rule, bound to unload except on production of the bill of lading, he is not bound to keep goods on board his ship if no bill of lading is produced.

If the consignee or holder of the bill of lading does not claim delivery within a reasonable time, the master may land and warehouse the cargo in a statutable (n) warehouse at the expense of its owners, still preserving his lien on it, and it is his duty to act reasonably (o) in doing so rather than render the charterers, if they are not the defaulting consignees, liable for demurrage (p).

In such a case the warehouseman holds the goods as the common agent of the shipowner and of the consignee or indorsee of the bill of lading; agent of the shipowner to retain the goods under his lien for freight; agent of the consignee or indorsee to hold or deliver the goods for him on his producing the bill of lading and paying the freight (q).

Semble, that if there are no statutable warehouses, delivery into which preserves his lien, he can still retain it by hiring a warehouse for the purpose (r).

If, in unloading by the master, owing to the delay or absence of the consignee, difficulties arise, from the inaccurate description of goods in the bill of lading, the consignee must bear the resulting loss (s).

If the master is forbidden to land the goods by the port authorities, or cannot obtain warehouse accom-

(n) *I.e.*, a warehouse, on the goods in which the lien of the shipowner is preserved by some statute, such as M. S. Act, 1894, s. 494. (See Appendix III.)

(o) See *Smailes v. Hans Deegen* (1906), 12 Com. Cas. 117.

(p) *Howard v. Shepherd* (1850), 9 C. B. at p. 321. *Erichsen v. Barkworth* (1858), 3 H. & N. 601. This power is also given by express provision in most bills of lading. See article 127, Note 1.

(q) See *Willes, J., Meyerstein v. Barber* (1866), L. R. 2 C. P. 38, at p. 50.

(r) *Mors le Blanch v. Wilson* (1873), L. R. 8 C. P. 227.

(s) *Shirwell v. Shaplock* (1815), 2 Chit. 397.

modation, he may, and must, deal with them in the manner both most reasonable to preserve his lien, and most convenient in his judgment for their owner, at their owner's expense (*).

Article 127.—Statutory Provisions as to Unloading.

By statute (*u*), a shipowner is at liberty to land any goods imported in his ship from foreign parts into the United Kingdom, whenever (*x*) their owner fails to make entry of them at the custom house, or having made entry fails to take delivery of them within a certain time (*y*), whether such failure was caused by the fault of the goods-owner or not, provided it was not caused by the fault of the shipowner (*z*).

This statutory power may be excluded or varied by express agreement (*a*), or by the custom of the port (*b*).

I. Time at which such landing may take place.

- (1.) If a time is named in the charter or 'bill of lading, at any time after the expiration of such time (*c*), and before the consignee is

(*t*) *Cargo ex Argos* (1872), L. R. 5 P. C. 134; *Mors le Blanch v. Wilson* (1873), L. R. 8 C. P. 227; *Edwards v. Southgate* (1862), 10 W. R. 528. See Article 138.

(*u*) Merchant Shipping Act, 1894, ss. 492-501; see Appendix III.

(*x*) The Act only applies to the case of a consignee failing to be ready to take delivery when the shipowner is ready to land his goods: *per Brett, M.R., Marzetti v. Smith* (1884), 49 L. T. at p. 583.

(*y*) Where the cargo is apportionable, if the shipowner lands part but the consignee applies in time to take delivery of the remainder, the shipowner is not entitled to land the remaining part unless the consignee's failure to take the first part has prejudiced the shipowner in the delivery of the remainder: *Wilson v. London Steam Co.* (1865), L. R. 1 C. P. 61.

(*z*) *The Energie* (1875), L. R. 6 P. C. at p. 316.

(*a*) See Note 1 and Note 2 *infra*.

(*b*) Such custom may either apply to the whole port, as in *Marzetti v. Smith* (1884), 49 L. T. 580; or to a particular trade, as in *Aste v. Stumore* (1884), 1 C. & E. 319, where a custom of the London grain trade to discharge on the quay, if the merchant did not demand the grain within twenty-four hours of ship's arrival, was proved: *Alexiadi v. Robinson* (1861), 2 F. & F. 679, at p. 683, where a custom in the London fruit trade of immediate discharge was proved.

(*c*) M. S. Act, 1894, s. 493, sub-s. 1 *a*; and see Appendix III.

ready and offers to take delivery of the goods (d).

- (2.) If no time is so named, then at any time after the expiration of seventy-two hours, Sundays and holidays excepted, from the report of the ship at the custom house (e).

Quære whether the shipowner under these provisions may land the goods before it is clear that the ship cannot be discharged without coming on demurrage, *i.e.* before it is certain that the consignee cannot take delivery within the time allowed him by the contract (f).

II. *Place where goods are to be landed.*

- (1.) If possible and convenient, at the wharf or warehouse named in the charter or bill of lading (g).

- (2.) If no such place is named, at a legal customary wharf or warehouse for such goods (h).

Where goods are landed for assortment and their owner or consignee at the time of landing has made entry, and is ready to take delivery for another wharf or warehouse, the goods shall, if demanded, be delivered to their owner within twenty-four hours after assortment, the expenses of landing and assortment to be borne by the shipowner (i).

Where, before the goods are landed, their owner or consignee has entered them as "overside goods," and has offered and been ready to take delivery of them (k), but the shipowner has failed to make delivery of them,

(d) Sect. 493, sub-s. 3. The time at which the consignee is to take delivery may commence before the ship is reported at the custom house, if by the practice of the customs officers of the port discharge may begin before such report: *Major v. Grant* (1902), 7 Com. C. 231.

(e) Sect. 493, sub-s. 1 b.

(f) See the judgment of Channell, J., *Smailes v. Hans Dessen* (1905), 11 Com. Cas. 74. The Court of Appeal, S. C., 12 Com. Cas. 117, declined to decide the point.

(g) M. S. Act, 1894, s. 493, sub-s. 2 a.

(h) Sect. 493, sub-s. 2 b.

(i) Sect. 493, sub-s. 4.

(k) The goods owner or his agent must be ready at the time of the offer: *Berresford v. Montgomerie* (1864), 17 C. B. N. S. 379.

or then to inform the offerer when delivery will be made (*l*), the shipowner shall before landing the goods give twenty-four hours' notice in writing to the owner of the goods (*m*) of his intention to deliver, and if he lands before that time shall do so at his own risk and expense (*n*).

Where the consignee disputes the propriety of landing at his expense, his proper course is to pay under protest any charges incurred, and thus to prevent his being damaged by detention of the goods. He can then sue to recover the payment (*o*).

The shipowner can also use the provisions of the Merchant Shipping Act to enforce his lien for freight, demurrage, or any other charges for which he has a lien under the contract of affreightment by giving notice to the warehouseman of such lien (*p*). The goods owner can only obtain his goods by paying the claim, or by depositing with the warehouseman the sum claimed, giving him notice to retain all or part of it (*q*). The

(*l*) It is not necessary that the agent of the consignee should formally demand correct information: *Berresford v. Montgomerie*, *vide supra*; but *semble*, that if the shipowner is then *bonâ fide* ignorant of the position of the goods in the ship, this does not constitute a "failure to inform": *Oliver v. Colven* (1879), 27 W. R. 822.

(*m*) The lighterman is the agent of the goods owner to receive notice: *The Clan Macdonald* (1883), 8 P. D. 178, at p. 185.

(*n*) M. S. Act, 1894, s. 493, sub-ss. 4, 5. These sections have been discussed in *The Clan Macdonald* (1883), 8 P. D. 178, where it was held that the first applies to "overside goods" which must be landed for assortment, the second to overside goods which need not be landed for assortment. It is submitted that Sir J. Hannen was in error (p. 184) in making the goods owner's failure to take delivery at the time when it becomes necessary to land the goods for assorting a condition precedent to the shipowner's right to land the goods at his own expense under subsect. 4; it would seem rather to relieve the shipowner of the necessity of paying such expense. On this, see Mathew, J., in *Marzetti v. Smith* (1884), 49 L. T. at p. 533.

(*o*) *Alexiadi v. Robinson* (1861), 2 F. & F. 697. *Cf. Thorsen v. M'Dowall* (1892), 19 Sc. Sess. C. 743.

(*p*) M. S. Act, 1894, s. 494. *Quære* whether the right to land goods under sect. 494 only exists in the circumstances provided in sect. 493, or whether there is an independent right under sect. 494 unaffected by the provisions of sect. 493. See *Smailes v. Hans Dessen* (1906), 11 Com. Cas. 74; 12 Com. Cas. 117. As to the case of goods being landed not under sect. 493 but pursuant to a provision in the bill of lading, see Note 2, *infra*.

(*q*) Sects. 495, 496.

warehouseman must retain the sum mentioned in the notice for thirty days, and, if the shipowner has then instituted proceedings to establish his right, till the determination of those proceedings, but may pay the undisputed balance over to the shipowner (*r*). In certain events the warehouseman has a power of sale over the goods (*s*).

The fact that a person has made a deposit and received the goods does not of itself give the shipowner any personal right of action against him to recover the claim (*t*); he can only claim a declaration that he has a lien on the cargo and deposit for the sum he claims (*u*).

If it is subsequently held that the shipowner had no right to the sum claimed, or to any disputed balance, the goods owner will be entitled to recover from him, by way of damages, interest on the disputed sum for the period of the deposit (*x*).

Note 1.—Almost all modern bills of lading have some such clause as the following:—

“The shipowner shall be entitled to land these goods on the quays of the dock where the steamer discharges immediately on her arrival, and upon the goods being so

(*r*) Sect. 496, sub-ss. 3, 4.

(*s*) Sect. 497. It is a disputed question whether, if the proceeds of the goods are insufficient to pay the warehouseman's charges, he can claim the balance from the shipowner. Probably not. See sect. 499. Whether he can recover it from the owner of the goods also seems doubtful.

(*t*) *Furness v. White*, (1895) A. C. 40.

(*u*) See for procedure in such a case *Montgomery v. Foy*, *Morgan & Co.*, (1895) 2 Q. B. 321; *Euterpe S.S. Co. v. Bath* (1897), 2 Com. Cases, 196. But if the person who has made the deposit is the owner of the goods by indorsement of the bill of lading, or has actually contracted to pay freight, he cannot abandon the goods and refuse to pay freight, and in such a case Messrs. W. N. White were held personally liable by the Court of Appeal in the case of *Thompson v. White*, on May 4, 1898. If, there being no contract with, or property in the consignee, he cannot be personally sued, he cannot, in an action for a declaration, counterclaim for short delivery or damage to the goods, but in *Montgomery v. Foy*, *Morgan & Co.*, (1895) 2 Q. B. 321, which was such a case, the shipper, at his own request, was joined as defendant to enable him to counterclaim.

(*x*) So held by Bray, J., in *Red R. S.S. Co. v. Allatini* (1909), 14 Com. Cas. 82, at p. 92, following Kennedy, J., in *Green v. Georgii* (not reported).

landed the shipowner's responsibility shall cease. This clause is to form part of this bill of lading, and any words at variance with it are hereby cancelled" (known as the "*London Clause*") (y).

Note 2.—Where by the contract in his bill of lading the shipowner is given the right to land the goods subject to his lien for freight (equivalent to his statutory right under sects. 493 and 494 of the Act), he may insist on the freight being paid to himself before the goods are released, and the goods owner cannot claim the advantage of sect. 495 so as to get the goods released on depositing the freight with the warehouseman. In other words, if the shipowner does what is prescribed by sects. 493 and 494 but does it under power given by contract and not by virtue of the statute, the goods owner cannot avail himself of sects. 495 and 496 (z).

Note 3.—Where by the terms of his contract the shipowner has to deliver the cargo, he must pay any expenses necessarily involved in the process of delivering, *e.g.* the expenses of providing bags in which coffee beans escaping from bags broken on board the ship must be replaced in order to effect their discharge (a).

Note 4.—When the ship's liability is to cease is usually expressly provided in the bill of lading, *e.g.*:—"Ship's responsibility ceases immediately the goods are discharged from the ship's deck"; or "the goods, etc. . . as soon as they are discharged over the ship's side shall be at the risk of the shipper or consignee"; or "goods at risk of consignee from ship's tackles";—or as in the *London Clause* as above; or—"The ship's responsibility ceasing when delivering into lighter when the goods are over the ship's side level with the rail." In the absence of any such express provision, the question must be decided by the custom of the port of discharge; and, if no such custom can be proved, the general rule appears to be "that goods are delivered when they are so completely in the custody of the consignee that he may do as he pleases with them," in other words, when they pass

(y) See, for instances of the operation of such a clause, *Alexiadi v. Robinson* (1861), 2 F. & F. 679; *Wilson v. London, &c. Steam Co.* (1865), L. R. 1 C. P. 61; *Oliver v. Colven* (1879), 27 W. R. 822; *Major v. Grant* (1902), 7 Com. C. 231. The clause does not apply in the case of goods landed not in the docks but at a wharf: *Produce Brokers Co. v. Furness Withy* (1912), 17 Com. Cas. 165.

(z) *Dennis v. Cork S.S. Co.*, (1913) 2 K. B. 393.

(a) *Leach v. Royal Mail Co.* (1910), 16 Com. Cas. 143.

from agents of the shipowner to agents of the consignee (b).

Note 5.—There is often a clause in bills of lading requiring claims for damaged (c) goods to be made within a certain time, as before removal, or within seven days after the goods are landed, or within one month of steamer's arrival.

(b) See *British Shipowners v. Grimond* (1876), 3 Sc. Sess. C., 4th Ser. at p. 972; and *Knight S.S. Co. v. Fleming* (1898), 25 R. (Sess. Cas.) 1070. Cf. *The Jaederen*, (1892) P., per Barnes, J., at p. 358, as to cases where the whole discharge is done by a dock company as agents for shipowner and charterer.

(c) This includes both apparent and latent damage: *Moore v. Harris* (1876), 1 App. C. 318.

SECTION IX.

DEMURRAGE.

Article 128.—Nature of Demurrage.

DEMURRAGE, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading. When the time is not agreed, or where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to recover unliquidated "damages for detention." The phrase "demurrage" is sometimes loosely used to cover both these meanings (a).

A stipulation as to demurrage is one for the benefit of the charterer as well as of the shipowner, *i.e.* a charterer, at the price of paying the agreed demurrage, is entitled to keep the ship for the agreed time, or, if not agreed, for a reasonable time (b), beyond the lay days, and the shipowner is not entitled to sail away directly the lay days have expired, treating the provision for demurrage as merely for his protection if he allows the ship to remain beyond the lay days (c).

(a) For a discussion of the resulting difficulties, see Article 54 :—"The Cesser clause."

(b) A "reasonable time," for this purpose, would appear to expire when either (i) there has been such delay as to evidence a final refusal by the charterer to load, or (ii) such delay as to amount to frustration of the adventure. Per Scrutton, L.J., *Inverkip S.S. Co. v. Bunge*, (1917) 2 K. B. at p. 201.

(c) *Wilson & Coventry v. Thoresen*, (1910) 2 K. B. 405. Cf. *Lilly v. Stevenson* (1895), 22 Sess. Cas. (4th Ser.) 278. "Days stipulated for by the merchant on demurrage are just lay-days, but lay-days that have to be paid for," Lord Trayner, *ibid.* at p. 286. (It is not *this dictum* that is disapproved in *Inverkip S.S. Co. v. Bunge*, (1917) 2 K. B. at p. 203.) *Quære* whether, there being no provision for

Stipulations for demurrage may be—

- (1.) *Exhaustive*: as “ten days for loading and demurrage at £20 per diem afterwards,” which covers all delay. On such a provision the shipowner cannot say that the provision for £20 a day demurrage only applies to a reasonable time, after the lapse of which he can claim damages for detention. After the lapse of a reasonable time he may take his ship away, but if he allows her to stay on he can only claim the agreed rate of demurrage (d).
- (2.) *Partial*: as “ten days to load, ten days on demurrage at £20 per diem,” when all delay after twenty days will give rise to damages for detention: or “demurrage at £20 per diem” (e), when demurrage will begin at a time unascertained, except that it must be when a reasonable time for loading has elapsed.

demurrage, the charterer can insist on the ship remaining for a reasonable time after expiration of the lay-days on paying damages for detention: *Wilson & Coventry v. Thoresen*, *ubi supra*. The charterer may keep the ship for all the specified lay-days, even though he could load her in less time: *Petersen v. Dunn* (1895), 1 Com. Cas. 8. But if the charterer does complete the loading before the lay-days expire, he cannot delay presentation of the bill of lading, and so keep the ship in port: *Nolisement Co. v. Bunge*, (1917) 1 K. B. 160.

(d) *Western S.S. Co. v. Amaral Sutherland*, (1913) 3 K. B. 366; *Inverkip Co. v. Bunge*, (1917) 2 K. B. 193.

(e) *Cf. Harris v. Jacobs* (1885), 15 Q. B. D. 247, in which Brett, L.J., laid down that “such a payment was in the nature of demurrage: the clause as to demurrage in a charter being elastic enough in the ordinary construction of a charter to comprise such a damage as this,” and cited as authority his own judgment in *Sanguinetti v. Pacific Co.* (1877), 2 Q. B. D. 238, at p. 252, for criticisms on which see the note to Article 54, p. 178. The Scotch Courts take a stricter view of “demurrage”: *cf. Gardiner v. Macfarlane* (1889), 16 Sc. Sess. C., 4th Ser. p. 658; and *cf. the English Courts in Clink v. Radford*, (1891) 1 Q. B. 625, and *Dunlop v. Balfour*, (1892) 1 Q. B. 507. For the effect of a stipulation to load “on conditions of colliery guarantee,” see *Restitution Co. v. Pirie* (1889), 61 L. T. N. S. 330: affirmed in C. A. 6 Times L. R. 50; *Monsen v. Macfarlane*, (1895) 2 Q. B. 562 (C. A.); *Ship Saxon v. Union S.S. Co.* (1900), 5 Com. C. 381; *Shamrock S.S. Co. v. Storey* (1899), 5 Com. C. 21; *Thorman v. Dowgate S.S. Co.*, (1910) 1 K. B. 410.

- (3.) *Absent*: as “ten days to load,” or “load according to the custom of the port,” or simply “load,” where all unexcused delay will give rise to “damages for detention.”

Note.—The charterer or consignee cannot, in answer to a claim for demurrage, plead that the shipowner could have, and ought to have, lessened the amount of the delay by landing the goods, and so mitigated the claim for demurrage. In *The Arne* (f), where there was a clause in the bill of lading providing that if the consignee did not take delivery immediately after arrival the goods might be landed by the ship at the expense and risk of the goods owner, it was held that this was an option given to the shipowner for his protection, and that the consignee could not rely on it as an answer to a claim for demurrage. The same principle was laid down by Lindley, L.J., in *Hick v. Rodocanachi* (g). On the other hand, the shipowner cannot claim demurrage for delay caused only by his own unreasonable conduct (h): in certain circumstances, therefore, he might be unable to claim demurrage caused by his own exercise of a lien for freight on the cargo, when he might have landed the cargo, subject to his lien, under the provisions of the Merchant Shipping Act. This principle is recognised in *Lyle Co. v. Cardiff* (i), and in *Smailes v. Hans Dessen* (j), though in both cases it was held that the exercise of the lien was reasonable, and the shipowner was therefore not debarred from his claim for demurrage.

Article 129.—Demurrage, when payable.—Damages for Detention.

Demurrage becomes payable when the lay-days allowed for loading or unloading have expired. Such lay-days begin when the ship arrives at the place agreed upon in

(f) (1904) P. 154.

(g) (1891) 2 Q. B. 626, at p. 632.

(h) In *Robinson v. British Aluminium Co.* (November, 1915; not reported), it was held by Bailhache, J., under this principle, that it was unreasonable for the shipowner to exercise a lien for a claim for demurrage when the consignees offered to deposit the amount claimed in joint names in a bank. Cf. also *Alexiadi v. Robinson* (1861), 2 F. & F. 679; *Möller v. Jecks* (1865), 19 C. B. N. S. 332; and *Carlberg v. Wemyss Co.* (1915), Sess. Cas. 616.

(i) (1899), 5 Com. Cas. 87.

(j) (1906), 12 Com. Cas. 117.

the charter for the commencement of lay-days (*k*), and is there ready to proceed to her loading or discharging berth, prepared to load or discharge when she gets there (*k*), and they run continuously (*l*), in the absence of express agreement (*m*) or custom of the port (*n*) to the contrary, from that date. When the lay-days have expired, demurrage, in the absence of express agreement (*o*), runs continuously during the presence in the port of the vessel either ready for or engaged in the business of loading or discharging (*p*). If the ship has to be removed from the port, or becomes unfit for loading or discharging, *e.g.* by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage (*q*).

When once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable (*q*), unless the exceptions clause is clearly worded so as to have that effect (*r*).

Damages for detention (where demurrage is not provided for) become payable either —

- (1.) On the expiration of the specified lay-days, if any, as above;—or
- (2.) On the expiration of a reasonable time for loading or unloading when no lay-days are specified;—or

(*k*) *Vide* Articles 36, 39, *ante*; *Armement Adolf Deppe v. J. Robinson*, (1917) 2 K. B. 204; *Tharsis Co. v. Morel*, (1891) 2 Q. B. 647. A ship prevented from loading by quarantine is not "ready to load": *White v. Winchester* (1886), 13 Sc. Sess. C., 4th Ser. 524; *The Austin Friars* (1894), 10 Times L. R. 633.

(*l*) *M'Intosh v. Sinclair* (1877), 11 Ir. R. C. L. 456; *Nielsen v. Wait* (1885), 16 Q. B. D. 67.

(*m*) *E.g.*, "Sundays and holidays excepted."

(*n*) *Nielsen v. Wait*, *vide supra*, where a custom of the port of Gloucester not to reckon in the lay-days the time occupied in moving the ship from one place of discharge to another, was held good. In *Dickinson v. Martini* (1874), 1 Sc. Sess. C., 4th Ser. 1185, time spent in lightening outside the port, in order to proceed to a port of discharge, was included in the lay-days. See Article 37, *supra*.

(*o*) *E.g.*, if lay-days except "Sundays and holidays" and demurrage, is "per like day" or "per like hour": *Rayner v. Conder* (1895), 1 Com. Cases, 80.

(*p*) *Cf. Aktieselskabet Gimle v. Garland* (1917), 2 Sc. L. T. 254, as to the Saturday when ship on demurrage.

(*q*) *Tyne and Blyth Co. v. Leech*, (1900) 2 Q. B. 12

(*r*) *Lilly v. Stevenson* (1895), 22 Sess. Cas., 4th Ser. 278.

(3.) For delay after the expiration of the fixed number of days for which demurrage has been stipulated (s).

A charterer may also be liable for damages for detention of the ship during the voyage caused by his shipping cargo that involves such detention (t).

He may also be liable for damages for detention of the ship if by his breach of contract he delays her in the course of the voyage, *e.g.* by failure, at a port of call for orders, to give orders in due time (u), or by his delay in presenting bills of lading for signature (x).

Article 130.—Demurrage, how calculated.

Stipulations as to demurrage and lay-days must be strictly limited to those ports to which they are applied in the charter; a reasonable time for loading and unloading will be allowed at other ports on the voyage, to which such stipulations are not applied (y).

A stipulation as to cancelling the charter will not, unless it clearly so provides, apply after the vessel is on demurrage (z).

When the stipulations in a charter as to loading and unloading differ materially, it will not be allowable to lump together the days for loading and discharging, an intention to separate them being inferred (y).

The clause "to average the days for loading and dis-

(s) Where there is in the charter a liquidated sum fixed for demurrage, that sum will also be *prima facie* the measure of damages for detention beyond the period of demurrage.

(t) See pp. 117, 118, *supra*.

(u) Cf. *Aktieselskabet Springbank v. Dansk Fabrik* (1919), 24 Com. Cas. 178, and see p. 124.

(x) See p. 434, *infra*.

(y) See *Marshall v. Bolckow, Vaughan & Co.* (1881), 6 Q. B. D. 231; *Niemann v. Moss* (1860), 29 L. J. Q. B. 206; *Avon S.S. Co. v. Leask* (1890), 18 Sc. Sess. C. 280. For other cases where special stipulations as to demurrage were construed, see *Marshall v. De la Torre* (1795), 1 Esp. 367; *Stevenson v. York* (1790), 2 Chit. 570; *Sweeting v. Darthez* (1854), 14 C. B. 538.

(z) See *Steel Young v. Grand Canary* (1904), 9 Com. Cas. 275.

charging in order to avoid demurrage" (a) allows the charterer to add together the days agreed for both operations, not being liable for demurrage till the total days are exhausted (b), but such a provision does not necessarily apply to dispatch money as well as to lay-days (c).

Note.—In the absence of a custom of the port (d), the following phrases have the following meanings in clauses as to loading and discharging:—

Days means consecutive (e) calendar days of twenty-four hours commencing at midnight, and include Sundays and holidays (f). If the ship is not ready to load till part of the day has expired, the charterer is not bound to commence loading her until the commencement of the next calendar day; but if he does any work on the partial day it may be evidence of an agreement to treat it as a whole day (f). In the absence of express stipulation part of a calendar day on demurrage counts as a whole day (g).

Sundays and holidays excepted.—This provision excepts Sundays and holidays from the lay-days, even though work is done upon them, unless some actual agreement to count

(a) As to providing for this by using the word "reversible," see *Love v. Rowtor Co.*, (1916) 2 A. C. 527.

(b) *Molierie S.S. Co. v. Naylor Benzon & Co.* (1897), 2 Com. Cases, 92.

(c) *Rowland S.S. Co. v. Wilson, Sons & Co.* (1897), 2 Com. Cas. 198. The charterer electing to take dispatch money at port of loading, will be debarred from averaging the days to save demurrage at port of discharge: *Oakville Co. v. Holmes* (1899), 5 Com. Cas. 48. Not so, however, if the charterer's agent agrees, without authority to do so, at the port of loading to take dispatch money: *Love v. Rowtor Co.*, (1916) 2 A. C. 527.

(d) As in *Cochran v. Retberg* (1800), 3 Esp. 121, where the then custom of the port of London was proved to consider days as working days only, excluding Sundays and holidays; and *Nielsen v. Wait* (1885), 16 Q. B. D. 67.

(e) *Nielsen v. Wait, v. s.* The running day, or day of twenty-four hours, during which the ship is running, is opposed to the working day. But under the clause "to be loaded at the rate of 200 tons per running day . . . time to count twelve hours after written notice of readiness is given," the "running day" was held to mean periods of twenty-four hours beginning twelve hours after the receipt of the notice: *Leonis S.S. Co. v. Rank* (1907), 13 Com. Cas. 161.

(f) *The Katy*, (1895) P. 56; *Brown v. Johnson* (1842), 10 M. & W. 331; *Niemann v. Moss* (1860), 29 L. J. Q. B. 206.

(g) *Commercial S.S. Co. v. Boulton* (1875), L. R. 10 Q. B. 346; see also the report of the same case as to the ship "Boston" in 3 Asp. M. C. N. S. 111. See also *Horsley Line v. Roebling* (Sc.) (1908), Sess. Cas. 866.

them as lay-days is proved. This agreement will not be inferred from the fact that work is done (*h*). Neither a wet day, nor the usual half-holiday on Saturday, is included in the phrase "general or local holidays" (*i*).

Working days means all days on which work is ordinarily done at the port, excluding Sundays and holidays (*k*). It is immaterial that on one of them the charterer is prevented from loading, unless the cause of delay is covered by an exception (*l*). Evidence of custom is admissible to explain the meaning of "working day" (*m*). The number of hours in a working day on which a ship must load must be settled by the custom of the port, or express agreement (*k*).

Cargo to be discharged at the average rate of not less than — tons per day.—Such a clause, where the tonnage of the cargo, divided by the average rate of discharge, gives a fraction over a day, does not allow the charterer the whole of the last day. It is doubtful how the fraction is to be computed, probably by the proportion of hours used to the hours in the working day; but it is arguable that the charterer is only entitled to the number of days, and cannot claim the fraction over (*n*).

"One running day for every 400 tons up to 2800 tons, and for all quantities in excess 500 tons per day," a rule laid

(*h*) *Nelson v. Nelson*, (1908) App. Cas. 108, overruling *Houlder v. Weir*, (1905) 2 K. B. 267; *Whittall v. Rahtkens*, (1907) 1 K. B. 783, and *Branchelow v. Lamport*, (1907) 1 K. B. 787, *note*.

(*i*) *Love v. Rowtor Co.*, (1916) 2 A. C. 527, at p. 536.

(*k*) *Nielsen v. Wait* (1885), 16 Q. B. D. at p. 71. *Cf. Mein v. Ottman* (1904), 6 F. (Sess.) Cas. 276. A Saturday, though a half-holiday, must be treated as a working day. *Robert Dollar Co. v. Blood Holman & Co.* (1920), 4 Ll. L. Rep. 343.

(*l*) *Holman v. Peruvian Nitrate Co.* (1878), 5 Sc. Sess. C., 4th Ser. 657; where a "surf day" was held a working day. But contrast *British & Mexican Co. v. Lockett*, (1911) 1 K. B. 264.

(*m*) *British & Mexican Co. v. Lockett*, *ubi supra*, overruling *Bennetts v. Brown*, (1908) 1 K. B. 490.

(*n*) *Yeoman v. The King*, (1904) 2 K. B. 429. Cargo 2364 tons; rate 210 tons a day=11 days 54-210ths. The charterer was held not entitled to claim 12 days. *Cf. Horsley Line v. Roehling* (Sc.) (1908), Sess. Cas. 866. In *Houlder v. Weir*, (1905) 2 K. B. 267, upon a similar clause Channell, J., held that it related primarily to the number of days not hours, and if the calculation gave a fraction of a day at the end the charterer was entitled to a whole day. He distinguished *Yeoman v. The King* on the ground that there was in that case a provision for payment of demurrage per day "and pro rata," which made the case an exception to the rule. But (1) if the rate is 100 tons a day and the cargo is 950 tons, and if he has ten days to discharge, surely the charterer discharges at the average rate of 95 tons a day, not 100 as agreed, and (2) the Court of Appeal in deciding *Yeoman v. The King* do not appear to have rested their decision merely on the provision as to payment "pro rata."

down for all ships by the London Corn Trade Association, and incorporated in a charterparty. *Held*, that with a cargo of 3800 this meant the 400 tons rate for the first 2800 tons, and the 500 tons rate for the balance, and that it did not provide two separate rates for the whole contents of steamers under and over 2800 tons respectively (o).

Per working day of twenty-four hours: Held to mean that each twenty-four hours on which work was done was to count as a conventional day, though the hours might be on several days (p). It does not mean such a period of time as includes in it twenty-four ordinary working hours of the port (q).

Colliery working days means all days on which the colliery works in normal times and under normal circumstances, excluding Sundays and holidays, such as Mabon's Day in South Wales, which are not port holidays. It includes days on which the colliery would work ordinarily, but does not work owing to a strike (r).

Weather working days means days on which the weather allows working. The Court has applied the working rule of computation that if any substantial quantity of work is done, the day should be counted as a whole or half day, according as the time substantially exceeds half a day or not (s).

It is now usual, especially in the case of steamers, to stipulate for demurrage at so much per hour. Where "dispatch money" was to be paid at 10s. per hour on any time saved in loading or discharging, and four days were saved, it was held that they were to be taken as of twenty-four, and not of twelve, hours each, the "dispatch money" being payable on the time saved, or running hours, and not on the working hours (t). The clause "Sundays and fête days excepted" has been held to apply both to

(o) *Turner v. Bannatyne* (1903), 9 Com. Cas. 83, 306.

(p) *Forest S.S. Co. v. Iberian Ore Co.* (1899), 5 Com. Cases, 83. Cf. *Watson Brothers v. Mysore Manganese Co.* (1910), 15 Com. Cas. 159. But "per working day of twenty-four consecutive hours" was held to mean twenty-four actually consecutive hours whether by day or night: *Turnbull v. Cruickshank* (1905), 7 F. (Sess. Cas.) 265.

(q) *Orpheus Co. v. Bovill* (1916), 114 L. T. 750.

(r) *Saxon Ship Co. v. Union S.S. Co.* (1900), 5 Com. Cases, 381. The length of the working day or holiday is usually defined by the colliery guarantee. But under such a document the artificial extension of non-working days was held only to apply to lay-days, and not to demurrage days: *Saxon v. Union, v. s.*, overruling *Clink v. Hickie Borman*, No. 2, (1898), 4 Com. Cases, 292.

(s) *Brackelouw S.S. Co. v. Lamport & Holt*, (1897) 1 Q. B. 570.

(t) *Laing v. Holloway* (1878), 3 Q. B. D. 437.

dispatch money and lay-days (u), and therefore where the charterer, by speed in loading, dispatched the ship four days earlier than he was bound to do by the charter, but of the four days two were "Sundays or holidays," which were excepted from the lay-days, he was only allowed dispatch money on two days. He could not save days to which he was not entitled as lay-days by the charter.

Case 1.—A ship chartered, "to load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said laying days." *Held*, that from the context, "days" meant "working," not "running" days.

The ship came into dock on Tuesday evening at 5 P.M., reached her berth on Wednesday, at 8 A.M., and continued unloading till 8 P.M. She began again at 4 A.M., on Thursday, and finished at 8 A.M. *Held*, she was liable for two days' demurrage (the lay-days having been exhausted at the port of loading) (x).

Case 2.—By charter seven running days were allowed for discharging; the vessel arrived on Saturday and was cleared by 10 A.M., when she gave notice of readiness to discharge. The charterers at first declined to receive cargo, but afterwards received it from 1 P.M., to 4 P.M., when work stopped. *Held*, that charterers' conduct amounted to an agreement that Saturday should be counted as a lay-day, though they were not otherwise bound to take discharge on that day at all (y).

Case 3.—A ship was chartered "to be loaded in X. in fourteen days, and to be discharged, weather permitting, at not less than twenty-five tons per working day, holidays excepted." *Held*, that the days for loading must be taken as "running days," the days for unloading as working days (z).

Case 4.—A charter provided: "Cargo to be loaded and discharged as fast as steamer can receive and deliver during working hours. If longer detained £12 per diem demurrage." *Held*,

(u) *The Glen Devón*, (1893) P. 269; approved, *dissentiente* Fletcher Moulton, L.J., by the Court of Appeal in *Nelson v. Nelson*, (1907) 2 K. B. 705. The House of Lords did not discuss this point, and the headnote in (1908) A. C. 108, is inaccurate. In *In re Royal Mail Co. and River Plate Co.*, (1910) 1 K. B. 600, where by the charter dispatch money was to be paid for "each running day saved," Bray, J., distinguished *The Glen Devón* and followed *Laing v. Holloway* (v. s.). Bray, J., also expressed his agreement with the dissentient judgment of Fletcher Moulton, L.J., in *Nelson v. Nelson*, holding that the *Glen Devón* was wrongly decided. See also *Mawson v. Beyer*, (1914) 1 K. B. 304, in which the foregoing cases are discussed.

(x) *Commercial S.S. Co. v. Boulton* (1875), L. R. 10 Q. B. 346; *Hough v. Athya* (1879), 6 Sc. Sess. C., 4th Ser. 961.

(y) *The Katy*, (1895) P. 56.

(z) *Niemann v. Moss* (1860), 29 L. J. Q. B. 206.

that saving of time at the port of discharge could not be set off against delay at port of loading (a).

Case 5.—A charter provided: "Ship to be loaded in nine working days . . . loading time to count from 6 A.M. after ship is ready . . . steamer to work day and night if required to do so." *Held*, that "working day" meant a day of twelve hours from 6 A.M., and not a day of twenty-four hours, and that the ship was on demurrage from 6 P.M. on the ninth day (b).

Article 131.—Charterer's Undertaking:—To load or unload in a fixed Time.

Charterparties, in regard to the time for loading or discharge, fall into two classes (c), (i) for discharge in a fixed time, (ii) for discharge in a time not definitely fixed (d). If a charterparty is to fall within the first class the provision for a fixed time must be in plain and unambiguous terms (e).

If by the terms of the charter the charterer has agreed to load or unload within a fixed period of time (f), that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever be the nature of the impediments which prevent him from

(a) *Avon S.S. Co. v. Leask* (1890), 18 Sc. Sess. C. 280; following *Marshall's Case* (1880), 6 Q. B. D. 231.

(b) *Mein v. Ottman* (1904), 6 F. (Sess. Cas.) 276.

(c) *Hulthen v. Stewart*, (1903) A. C. 389; *Van Liewen v. Hollis*, (1920) A. C. 239.

(d) As to (ii) see Article 132.

(e) Lord Macnaghten in *Hulthen v. Stewart* (*ubi supra*), at p. 394; *Van Liewen v. Hollis* (*ubi supra*).

(f) The effect is the same, if the days can be calculated, as where the rate of loading or discharge per day is fixed; cf. *Alexander v. Aktieselskabet Hansa*, (1920) A. C. 88; *Aktieselskabet Gimle v. Garland* (1917), 2 Sc. L. T. 254. But in *Dobell v. Watts* (1891), 7 T. L. R. 622, a clause, "Cargo to be loaded as fast as vessel can receive in ordinary working hours, and to be received as customary as fast as steamer can deliver in ordinary working hours—not less than one hundred standards a day loading or discharging," was held by the C. A. not a clause obliging the charterer to receive one hundred standards a day, and so fixing the number of lay-days, but a clause for the benefit of charterers only. See also *Love v. Rowtor Co.*, (1916) 2 A. C. 527, where a printed form of charterparty for discharge in a reasonable time was by written words turned into one for a fixed time. In consequence a reference in the print to "customary discharge" was neglected as insensible and inapplicable. Cf. *Baird v. Price Walker* (1916), 115 L. T. 227.

performing it (*g*), unless such impediments are covered by exceptions in the charter (*h*), or arise from the loading or unloading being illegal by the law of the place where they have to be performed (*i*), or arise from the fault of the shipowner or those for whom he is responsible (*k*).

(*g*) *Per* Lord Selborne in *Postlethwaite v. Freeland* (1880), 5 App. C. 599, at p. 608. For a striking example of the absolute nature of the obligation see *Porteus v. Watney* (1878), 3 Q. B. D. 223, 534. In *Potter v. Burrell*, (1897) 1 Q. B. 97, under a charter for a series of ships "as nearly as possible a steamer a month," to be loaded in a fixed time; owing to excepted perils, two steamers arrived at the same time and could not with the resources of the port be loaded in the fixed time. *Held*, by the C. A., that as the shipowner was not liable for the delay, the charterer was not excused by it. See, however, *Nelson v. Nelson*, (1908) App. Cas. 108, where a similar question was differently decided. The headnote of the report is inadequate and inaccurate. *Potter v. Burrell* does not appear to have been cited. For the provision "two voyages per month, fortnightly," see *The Melrose Abbey* (1898), 14 T. L. R. 202.

(*h*) See note at end of this article. For an illustration of this, see *Granite S.S. Co. v. Ireland* (1891), 19 Sc. Sess. C. 124, where the excepted peril occurred, but did not prevent the discharge of the ship, only the removal of its cargo from the quay when discharged. See also *Aktieselskabet Argentina v. Von Laer* (1903), 19 Times L. R. 151. The addition of the words "provided the steamer can deliver at this rate," will not relieve the charterer in a case where the steamer is in fact prevented by existing circumstances, but in normal circumstances is of a capacity so to deliver: *Northfield S.S. Co. v. Compagnie de Gaz*, (1912) 1 K. B. 434; *Alexander v. Aktieselskabet Hansa*, (1920) A. C. 88. In some charters recently these words have been altered to, "provided the steamer with the men and appliances actually employed by her can deliver at this rate." This seems to achieve the result unsuccessfully contended for by charterers in the above two cases.

(*i*) *Semble*, from *Ralli v. Compania Naviera*, (1920) 2 K. B. 287, which overrules *Blight v. Page* (1801), 3 B. & P. 295, note, and *Barker v. Hodgson* (1814), 3 M. & S. 267. See Article 4 *supra*. Illegal orders of the authorities will not protect the charterer, who has his remedy against them: *Bessey v. Evans* (1815), 4 Camp. 131; *Gosling v. Higgins* (1808), 1 Camp. 450; *The Neuport* (1858), Swabey, 335. Compare the principle involved in *Evans v. Bullock* (1877), 38 L. T. 34; *Ronneberg v. Falkland Islands Co.* (1864), 17 C. B. N. S. 1; *Sully v. Duranty* (1864), 3 H. & C. 270. Where a ship otherwise ready to load is prevented from loading by quarantine, the lay-days stipulated in the charter will not begin to run till the quarantine has expired: *White v. Winchester* (1886), 13 Sc. Sess. C., 4th Ser. 524; *The Austin Friars* (1894), 10 Times L. R. 633.

(*k*) *Alexander v. Aktieselskabet Hansa* (*ubi supra*), in which Lord Finlay at p. 94 quotes the text above with approval: *Budgett v. Binnington*, (1891) 1 Q. B. 35; *Benson v. Blunt* (1841), 1 Q. B. 870; *The Anna* (1902), 18 T. L. R. 25; *Hansen v. Donaldson* (1874), 1 Sc. Sess. C., 4th Ser. 1066, where discharge was impeded by the insufficiency of the shipowner's crew. (As to this case see also *Alexander v. Aktieselskabet Hansa*, (1920), (*ubi supra*). Where loading or discharge is a

Thus, after the ship is ready to load or unload at the agreed place (*l*), the charterer will not, in the absence of express exceptions, be released from his contract by delay resulting from the crowded state of the docks (*m*), bad weather (*n*), or ice preventing loading (*o*), insufficient supply of cargo (*p*), or strikes of persons for whom the shipowner is not responsible, even though the shipowner is prevented by the same cause from performing his share of the work (*q*); and when there is a provision for demurrage, the charterer (at the price of paying the demurrage) can insist on the ship remaining for a reasonable time to complete loading (*r*). On the other hand, the charterer is entitled to keep the ship the whole of the lay-days though he could have loaded her in less time (*s*).

joint operation, it follows from *Budgett v. Binnington* that the inability of the shipowner to do his part will only excuse the charterer when it is that alone which prevents the charterer from doing his share of the work. In *Harris v. Best* (1893), 68 L. T. 76, delay was caused by restowing some cargo that had shifted, and restowing other cargo to enable fresh cargo to be properly stowed. The stevedore was employed and paid by the owners. *Held*, the charterers were not liable for demurrage for this delay, the stevedore being the owner's servant. In *Houlder v. Weir*, (1905), 2 K. B. 267, it was held that where the charterer was delayed towards the end of the discharge by reason of the shipowner's necessary operation of taking in ballast to stiffen the ship, the charterer was liable for demurrage during that delay. The decision seems doubtful.

(*l*) See Articles 36, 39, *ante*, and *Tharsis Co. v. Morel*, (1891) 2 Q. B. 647.

(*m*) *Randall v. Lynch* (1810), 2 Camp. 352; *Brown v. Johnson* (1843), 10 M. & W. 331; *Tapscott v. Balfour* (1872), L. R. 8 C. P. 46. Where, however, the charter provided for discharge, "in regular turn with other vessels at the average rate of 30 tons a day," and the commencement of the discharge was delayed by the vessel having to wait her turn according to the custom of the port, the charterer was *held* not liable for the delay: *The Cordelia*, (1909) P. 27.

(*n*) *This v. Byers* (1876), 1 Q. B. D. 244.

(*o*) *Barret v. Dutton* (1815), 4 Camp. 333.

(*p*) See Article 42.

(*q*) See *ante*, note (*k*), p. 349.

(*r*) *Wilson & Coventry v. Thoresen*, (1910) 2 K. B. 405. *Quære* whether, in the absence of any provision for demurrage, he can similarly insist at the price of paying damages for detention: *ibid*.

(*s*) *Petersen v. Dunn* (1895), 1 Com. Cases, 8. If, however, the charterer does complete the loading before the lay-days expire he cannot keep the ship in port by delay in presenting the bill of lading: *Nolise-ment Co v. Bunge* (1917), 1 K. B. 160.

The provisions of the charter as to fixed days must be limited to the ports to which they expressly refer (*t*), and a reasonable time will be allowed for loading or unloading at ports not expressly provided for (*u*).

Note.—The occurrence of an obstacle preventing loading or unloading, which is within an exception, does not excuse the charterer absolutely, but only in so far as it in fact prevents him from fulfilling his contract. Thus, in *Elswick S.S. Co. v. Montaldi* (*x*), where the charterer, who had to discharge at an average rate of 500 tons a day, was behind his time, and then a strike occurred, delaying, but not preventing, the discharge, Bigham, J., held the charterer excused only to the extent to which the strike delayed the discharge of that cargo which, had the charterer used due diligence before, would have remained on board at the time when the strike occurred (*y*).

Case 1.—A ship was chartered to unload in the London Docks, forty days being allowed as lay-days; owing to the crowded state of the docks the vessel was detained forty-one days over the lay-days. *Held*, that the charterer was liable for delay (*z*).

Case 2.—A ship was chartered to load at London, with thirty running days; owing to frost the loading of the ship was prevented. *Held*, the charterer was liable for the delay (*a*).

Case 3.—A charter to discharge at Bristol allowed a fixed number of days for discharging. The custom at Bristol was that discharge was the joint act of the charterer and shipowner. Discharge was prevented by a strike of labourers, which prevented both shipowner and charterer from performing their part of the discharge. *Held*, that as the charterer was not prevented from discharging by the fault of the shipowner or persons for whom the shipowner was responsible, he was not excused for delay beyond the fixed lay-days (*b*).

(*t*) *Marshall v. De la Torre* (1795), 1 Esp. 367; *Stevenson v. York* (1790), 2 Chit. 570.

(*u*) *Sweeting v. Darthez* (1854), 14 C. B. 538. See also *Fowler v. Knoop* (1878), 4 Q. B. D. 299.

(*x*) (1907) 1 K. B. 626.

(*y*) *Cf. London & Northern Co. v. Cent. Arg. Ry.* (1913), 108 L. T. 527; *Central Arg. Ry. v. Marwood*, (1915) A. C. 981.

(*z*) *Randall v. Lynch* (1810), 2 Camp. 352.

(*a*) *Barret v. Dutton* (1815), 4 Camp. 333.

(*b*) *Budgett v. Binnington*, (1891) 1 Q. B. 35.

Articles 132 and 133.—To load or unload—In Reasonable Time—According to the Custom of the Port—As Customary—With Customary Dispatch.

If no fixed time for loading (or unloading) is stipulated in the charter the law implies an agreement on the part of the charterer to load or discharge the cargo within a reasonable time (*c*), and, so far as there is a joint duty in loading or unloading, that the merchant and ship-owner shall each use reasonable diligence in performing his part (*d*).

In the absence of express provisions, there is an absolute undertaking on the part of the charterer to have cargo ready to load (*e*), and a reasonable time for loading then begins (*f*). On a like principle, at the other

(*c*) *Hick v. Raymond*, (1898) A. C. 22. *Per* Lord Selborne in *Postlethwaite v. Freeland* (1880), 5 App. C. at p. 608; *Van Liewen v. Hollis*, (1920) A. C. 239. The time is unfixed whenever there is not a definite time expressed or implied (as in Article 131). The obligation is the same whether the charter is altogether silent as to the time, as in *Hick v. Raymond*, *v. s.*; or stipulates for "customary dispatch," as in *Postlethwaite v. Freeland*, *v. s.*; or "as fast as steamer can deliver" (*Good v. Isaacs*, (1892) 2 Q. B. 555); or both the last phrases (*Hulthen v. Stewart*, (1903) App. Cas. 389); or, "as fast as master shall require" (*Sea S.S. Co. v. Price* (1903), 8 Com. Cas. at p. 296). Nor is the obligation altered by a provision that time is to count on arrival of the steamer; *Bargate Co. v. Penlee Co.* (1921), 26 Com. Cas. 168; nor by a provision that a ready berth is to be given, *Glen Line v. Royal Commission* (1922), 10 Ll. L. R. 510. Discharge with more than customary dispatch can be secured by such words as "to be discharged continuously, any custom of the port to the contrary notwithstanding": *MacLay v. Spillers* (1901), 6 Com. Cases, 217 (as to which case see footnote (*c*) on p. 356, *infra*). *Cf.* *Crown S.S. Co. v. Leitch* (Sc.) (1908), Sess. Cas. 506. "forthwith" = without unreasonable delay: *Hudson v. Hill* (1874), 43 L. J. C. P. 273; *Forest Oak Co. v. Richard* (1899), 5 Com. Cases, 100.

(*d*) *Ford v. Cotesworth* (1870), L. R. 4 Q. B. at p. 137; 5 Q. B. 544; *Cunningham v. Dunn* (1878), 3 C. P. D. 443 (C. A.). Illegality by foreign law may either be taken into account in estimating reasonable time, as in the above cases, or treated as an absolute defence: *Ralli v. Compania Naviera*, (1920) 2 K. B. 287, and *supra*, p. 13, *post*, p. 358, note (*q*).

(*e*) And exceptions, unless clearly expressed otherwise, apply only to the actual loading, not to the procuring of cargo to be loaded. See Article 42; and *cf.* *Dampskibsselskabet Danmark v. Poulsen* (1913), Sess. Cas. 1043.

(*f*) *Ardan S.S. Co. v. Weir*, (1905) A. C. 501, which apparently overrules *Jones v. Green*, (1904) 2 K. B. 275. The analogous case of *Barque Quilpue v. Brown*, (1904) 2 K. B. 264, turns on knowledge by

end of the voyage, what is in question is the reasonable time for *discharge*. Therefore difficulties in getting the cargo away to an ulterior destination after the actual discharge are not to be taken into account (*g*).

"A reasonable time" means reasonable under the circumstances then existing, other than self-imposed inabilities of either shipowner or charterer (*h*), and should be estimated with reference to the means and facilities then available at the port, the course of business at the port (*i*), the customary methods employed at the port, and the character of the port with regard to tides and otherwise (*k*). Thus where a strike at the port of loading or discharge prevents a diligent consignee from doing his part of the work with reasonable exertions on his part, he will not be liable for the consequent delay (*i*).

This obligation to load or unload in a reasonable time imports, without express reference, a stipulation that the work shall be done in the manner customary in the port (*l*). But an express provision, "according to the

the shipowner of the method of loading. See also Article 42, *supra*. And see *Wilson v. Thoresen*, (1910) 2 K. B. 405.

(*g*) *Langham S.S. Co. v. Gallagher* (1911), 2 Ir. Rep. 348; *Dampskibsselskabet Svendborg v. Love* (1915), Sess. Cas. 543.

(*h*) But this limitation does not make the charterers liable for delay arising from the previous engagements, not of the charterers or their agents, but of the consignees to whom the charterers have sold the cargo: *Watson v. Borner* (1900), 5 Com. Cases, 377; *Ogmore v. Borner* (1901), 6 Com. Cases, 104. Nor does it extend to a case in which delay is due to the engagements of the charterers or shipowners themselves, when those engagements are reasonably made in the normal carrying on of their business, and do not create such an exceptional state of circumstances as the parties to the charter on signing it cannot be taken to have contemplated: *Harrowing v. Dupré* (1902), 7 Com. Cases, 157; *Quilpue v. Brown*, (1904) 2 K. B. 264. See also *Aktieselskabet Inglewood v. Millar's Karri* (1903), 8 Com. Cas. 196.

(*i*) *Hick v. Raymond*, (1893) A. C. 22; *per* Lord Selborne in *Postlethwaite v. Freeland* (1880), 5 A. C. at p. 609; *Hulthen v. Stewart*, (1903) App. Cas. 389; *The Arne*, (1904) P. 154.

(*k*) *Carlton S.S. Co. v. Castle Mail Co.*, (1898) A. C. 486.

(*l*) See *per* Lord Blackburn, *Postlethwaite v. Freeland* (1880), 5 A. C. at p. 613; A. L. Smith, L.J., *Lyle v. Caddiff*, (1900) 2 Q. B. at p. 643; Collins, M.R., *Temple v. Runnalls* (1902), 18 Times L. R. at p. 823. Lord Herschell thought otherwise: *Hick v. Raymond*, (1893) A. C. at p. 30. But if the charterer has not got cargo ready to load he cannot escape liability for ensuing delay by an allegation that he has done his best to load under a charter to load in the "usual and customary manner": *Ardan S.S. Co. v. Weir*, (1905) A. C. 501.

custom of the port," or "with customary dispatch," or "as customary," though usually unnecessary (*m*), is very commonly inserted (*n*). In consequence, every impediment arising out of that custom or practice which the charterer or shipowner could not have overcome by the use of any reasonable diligence (*o*) ought to be taken into consideration (*p*).

The express stipulations and the implied obligation as to customary dispatch refer to the customary manner of discharge, and only indirectly to the time usually occupied in discharging in such customary manner (*q*).

"Custom," or "customary," does not mean "custom" in the strict legal sense, but a settled and established practice of the port (*r*).

Note.—A series of very numerous cases has established that in all cases in which an undefined period is allowed for loading or discharge, the obligation is the same, viz. to do it in a reasonable time, and that what is a reasonable time depends on both (1) the existing circumstances of

(*m*) Theoretically an express reference to "the custom of the port" might impose on the charterer a greater obligation than would rest upon him if there were no such words—*e.g.*, if by the custom of the port he is bound to do something which in the existing conditions of the port he cannot in fact do even with the exercise of reasonable diligence. This principle was applied, and such a custom found, in *Aktieselskabet Hekla v. Bryson* (1908), 14 Com. Cas. 1. But that decision has been overruled by the H. L. in *Van Liewen v. Hollis* (1920), A. C. 239, and it may be doubted if any such custom can in fact exist.

(*n*) On the other hand, if the charter is expressly one for discharge in a fixed time a reference in its printed form to "customary dispatch" is insensible and inapplicable: *Love v. Rowtor Co.*, (1916) 2 A. C. 527.

(*o*) *Carali v. Xenos* (1862), 2 F. & F. 740: the shipowner had contracted to forward goods by foreign steamer, but missed the last steamer of the season; he had discharged according to the custom of the port, but could by diligence have expedited the discharge of these goods so as to catch the steamer. *Held*, that he was liable for the delay, apparently on the ground that he had not used what was due diligence under the circumstances.

(*p*) See the various cases referred to in the Note.

(*q*) *Dunlop v. Balfour*, (1892) 1 Q. B. at p. 520; *Castlegate S.S. Co. v. Dempsey*, *ibid.* at pp. 861, 862; *Metcalfe v. Thompson* (1902), 18 Times L. R. 706. *Cf.* *Sea S.S. Co. v. Price* (1903), 8 Com. Cas. 292; and *Ropner v. Stoute Hosegood & Co.* (1905), 10 Com. Cas. 73.

(*r*) *Per* Lord Blackburn, approving Lord Coleridge in *Postlethwaite v. Freeland* (1880), 5 A. C. at p. 616. See Article 8, *ante*.

the port (*i.e.* as opposed to the normal circumstances), and (2) the customary methods of the port (*s*).

That the obligation, where no time was fixed, was to do the work in a reasonable time, may be considered to have been settled as long ago as 1810 in *Burmester v. Hodgson* (*t*) and *Rodgers v. Forrester* (*t*). And indeed it is the ordinary rule of law that when a contract fixes no time for performance, it must be in a reasonable time (*u*). But it needed a long series of decisions to establish that a reasonable time depends on the circumstances mentioned above as (1) and (2); and this necessity arose from the disturbing effect, in the current of authority, of a few cases such as *Ashcroft v. Crow Colliery Co.* (*x*) and *Wright v. New Zealand Shipping Co.* (*y*), especially the latter. In both these cases the charterer seems to have done all that was reasonable, having regard to the existing (abnormal) circumstances of the port, but of necessity not all that he might have done under normal circumstances, and in both cases he was held liable for demurrage. Many ingenious attempts were made to reconcile the two cases with the other authorities (*z*), but to admit that they were wrongly decided seems to be the true refuge from the difficulty, and

(*s*) "There is no such thing as reasonable time in the abstract." *Per* Lord Herschell, *Carlton Co. v. Castle Mail Co.* (1898), A. C. at p. 491. If the measure of reasonable time could be based upon ideal methods or circumstances of the port, without taking account of its actual methods or circumstances, the time for discharge would be merely a matter of calculation, and would be, by implication, a fixed or ascertainable time. *Cf.* footnote (*f*) on p. 348.

(*t*) 2 Camp. 483 and 489. Those cases seem also to imply that the custom of the port fixes what is reasonable.

(*u*) *Cf.* Lord Watson, *Hick v. Raymond*, (1893) App. Cas. 22, at p. 32. It is not very easy to reconcile some remarks of Lord Blackburn in *Ford v. Cotesworth* (1863), L. R. 4 Q. B. at p. 133, with the statement by Lord Watson in this passage that the party "duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has acted neither negligently nor unreasonably." *Cf.* also *Sims v. M. R. Co.*, (1913) 1 K. B. 103.

(*x*) (1874), L. R. 9 Q. B. 540.

(*y*) (1879), 4 Ex. D. 165.

(*z*) As to *Ashcroft v. Crow Colliery Co.* (*v. s.*), see *Note* to Article 39, *supra*, p. 138. *Wright v. New Zealand Co.* (*v. s.*) (which was followed by a Divisional Court in *Tillett v. Cwm Avon* (1886), 2 Times L. R. 675) is discussed in *Postlethwaite v. Freeland* (1880), 5 App. C. at pp. 609, 617, in *Hick v. Raymond*, (1893) App. C. at p. 32, and by Bigham, J., in *Lyle v. Corporation of Cardiff* (1899), 5 Com. Cases, 87, at pp. 89 and 92. The best explanation seems to be that of A. L. Smith, L.J., in *Lyle v. Cardiff*, (1900) 2 Q. B. at p. 645. "In my judgment it is not now law." Lord Dunedin stirs the ashes once again in *Van Liewen v. Hollis* (1920), A. C. 239.

one which, in view of the sure establishment of the right principle, is now innocuous.

That the customary methods in use in the port are to be taken into account, though there is no express reference to custom in the contract, seems to follow from the principle that all the existing circumstances of the port are to determine the extent of the obligation, and appears to be now established by authority (a), although doubts upon the point were at one time suggested (b).

The obligation, therefore, upon the charterer or consignee, where no fixed time for discharge is mentioned, is in all cases, that the ship is to be discharged as quickly as is consistent with the manner in which every vessel going to the port is discharged (c), and the existing circumstances at the time when the vessel actually comes to the port, so far as these circumstances are not caused by the charterer or consignee (d). It follows that, with such an obligation in a charterparty or a bill of lading, there is no advantage in inserting exceptions affecting the obligation as to discharge (e.g. a strike clause), though this is commonly done (e).

The question to be answered is: "Did the charterers do, under the circumstances, all that could be reasonably expected of them?" (f).

(a) *Per* Lord Blackburn, *Postlethwaite v. Freeland* (1880), 5 App. Cas. at p. 613; A. L. Smith, L.J., *Lyle v. Cardiff*, (1900) 2 Q. B. at p. 643; Collins, M.R., *Temple v. Runnalls* (1902), 18 Times L. R. at p. 823.

(b) Lord Herschell, *Hick v. Raymond*, (1893) App. C. at p. 30. *Cf.* Bigham, J., *Lyle v. Cardiff* (1899), 5 Com. Cases, at p. 92. *Fowler v. Knoop* (1878), 4 Q. B. D. 299, seems to involve a similar implication.

(c) Contrast *Maclay v. Spillers* (1901), 6 Com. Cases, 217, in which the limitation to customary methods was excluded by the words "any custom of the port to the contrary notwithstanding." The proper effect of these words, it is suggested, is that the shipowner cannot rely upon a customary method of discharge as limiting or defining what it is reasonable for him to do. But in so far as it was decided in *Maclay v. Spillers* that the words had the further effect of turning the charter into a "fixed time" charter (i.e., that continuous discharge was guaranteed whether it was in the circumstances possible or not), the judgment of the C. A., reversing Mathew, J., on this point, seems inconsistent with the current of authority, *Cf. Rickinson v. Scottish Co-operative Society* (1918), 1 Sc L. T. 329; and *Van Liewen v. Hollis* (1920), A. C. 239.

(d) *Per* Lord Esher in *Caglegate S.S. Co. v. Dempsey*, (1892) 1 Q. B. at p. 859. As to the liability for "self-imposed inabilities," see note (h), at p. 353.

(e) *Cf. Hulthen v. Stewart*, (1903) A. C. 389; and *Van Liewen v. Hollis*, (1920) A. C. at p. 246.

(f) *Per* Collins, M.R., in *Hulthen v. Stewart*, (1902) 2 K. B. at p. 205. Put more briefly, the obligation on the charterers is "to do their best"; *per* Bigham, J., *Lyle v. Cardiff* (1899), 5 Com. Cases, at

Thus, where the consignee has been prepared to deliver in the customary manner into warehouses controlled by the harbour authorities, but is prevented because the warehouses without default of his are full (*g*); or to deliver into trucks on the quay, a rule of the port not allowing cargo to be deposited on the quay, but is prevented because the railway company without default of his does not supply such trucks (*h*); or where, the customary method being to discharge on to the dock, quays, or into lighters, the quays are overcrowded, and lighters, owing to a strike of lighter-men, are unobtainable (*i*); or even where the charterer, being the only shipper in the port, and using carts as a customary method to convey cargo to the quay, finds a scarcity of carts from their being otherwise employed (*k*) he is not liable for the subsequent delay.

So, where all the work of loading or discharging is done by a dock company as agents of shipowner and charterer or consignee, and the work is delayed, without fault of the charterer or consignee, by a strike of the dock company's men (*l*), or the crowded state of the dock quays (*m*), the charterer or consignee is not liable for the delay. But if the consignees of a cargo are the harbour authorities, they cannot excuse themselves, *quâ* consignees, for delay in discharge, on the plea of orders given or difficulties created by themselves, *quâ* harbour authorities (*n*).

p. 94. But it must be their best, and where there are alternative methods of discharge the charterers must use all available methods and exhaust all efforts to effect the discharge: *per* Mathew, J., *Rodenacker v. May* (1901), 6 Com. Cases, 37, at p. 40. They are not, however, bound to adopt even an available method if its employment involves an unreasonable expense. *Stewart v. Joseph Rank, Ltd.* (1920), 36 T. L. R. 728.

(*g*) *Good v. Isaacs*, (1892) 2 Q. B. 555.

(*h*) *Wyllie v. Harrison* (1885), 13 Sc. Sess. C. 92. It would be otherwise if there was no such rule of the port, or the ship could have discharged at another quay, in which case the delay would fall on the consignee: *Kruuse v. Drynan* (1891), 18 Sc. Sess. C. 1110; *cf. Granite S.S. Co. v. Ireland* (1891), 19 Sc. Sess. C. 124 (a case of fixed days). See also *Lyle v. Cardiff*, (1900) 2^d Q. B. 638.

(*i*) *Hulthen v. Stewart*, (1903) App. Cas. 389. Contrast *Rodenacker v. May* (1901), 6 Com. Cases, 37, where lighters might by reasonable efforts have been obtained.

(*k*) *Temple v. Runnalls* (1902), 18 Times L. R. 822.

(*l*) *Castlegate S.S. Co. v. Dempsey*, (1892) 1 Q. B. 854.

(*m*) *The Jaederen*, (1892) P. 351; *Weir v. Richardson* (1897), 3 Com. Cases, 20; *The Kingsland*, (1911) P. 17.

(*n*) *Zillah v. Midland Railway Co.* (1903), 19 Times L. R. 63; but compare *Harrowing v. Dupré* (1902), 7 Com. Cases, 157; and note (*h*), p. 353.

Case 1.—G. were consignees of cargo under a bill of lading specifying no time for delivery; during the delivery a strike occurred; the shipowners were ready to do their part of the work; but G., though using all diligence, could not do theirs. *Held*, that they were only bound to discharge in a reasonable time, having regard to the existing circumstances; and, having used all diligence themselves, were not liable for the delay caused by the strike (o).

Case 2.—A ship was chartered to discharge in London, the charter containing no provisions as to the time of unloading. Owing to the crowded state of the docks, the ship, though discharged in her turn, was delayed forty days beyond the usual time for discharge of such ships when the docks are not overcrowded. *Held*, that the charterer was not liable, both parties having used reasonable diligence to get the ship discharged (p).

Case 3.—A ship was chartered to load a cargo at Valencia, without any stipulation as to time of loading. The law of Spain forbids vessels with military stores on board to load at Spanish ports. The charterer and shipowner were aware at the time of making the charter that the vessel intended to carry military stores. The ship arrived at V. with military stores on board and was refused permission to load. *Held*, that neither party was liable to an action, as each, having used reasonable diligence to avoid the danger, was prevented by the act of a superior power (q).

Case 4.—A ship was chartered to unload at London "in the usual and customary time." The ship was discharged in her turn, with due diligence, but, owing to the crowded state of the docks, was detained forty-nine days longer than the usual time

(o) *Hick v. Raymond*, (1893) A. C. 22.

(p) *Burmester v. Hodgson* (1810), 2 Camp. 488. So explained in *Ford v. Cotesworth*, *post*. The case is also discussed in *Hick v. Rodocanachi*, (1891) 2 Q. B. 626, at pp. 635, 642. Cf. (1893) A. C. p. 22.

(q) *Cunningham v. Dunn* (1878), 3 C. P. D. 443 (C. A.), following *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 544. These two cases are reconcilable with such cases as *Barker v. Hodgson* (1814), 3 M. & S. 267, and *Blight v. Page* (1801), 3 B. & P. 294, note, cited in the last article, by the presence in the latter class of cases of a definite time for loading or unloading: see *per* Martin, B., in *Ford v. Cotesworth*, *vide supra*. See also *Sjoerds v. Luscombe* (1812), 16 East, 201. See also *Ralli v. Compania Naviera* (1920), 2 K. B. at p. 291, *per* Lord Sterndale, M.R., and p. 303, *per* Scrutton, L.J. The parties may have expressly provided for such cases by the charter, as in *Adamson v. Newcastle Insurance Association* (1879), 4 Q. B. D. 462, where there was a clause "in case of war, blockade, or prohibition of export, preventing loading, this charter to be cancelled," and it was held that the occurrence of these events cancelled the charter, without any express election by either party. See also *Steel Young v. Grand Canary Co.* (1904), 9 Com. Cas. 275, for a question arising on an obscurely worded cancelling clause.

of discharge when the docks were not crowded. *Held*, that the charterer was not liable (r).

Case 5.—A ship was chartered to deliver rails at Z., “the cargo to be discharged with all dispatch according to the custom of the port.” The custom was to discharge such cargo by a warp and lighters, which were under the absolute control of a company, who discharged vessels in their order of arrival. Owing to the number of vessels, and the insufficiency of lighters, the vessel did not begin to discharge for thirty-one days. Lighters could not have been procured from elsewhere in sufficient time to lessen the delay. *Held*, that the charterer was only bound to use the means of dispatch habitually used at the port, and having used these with all the diligence in his power, he was not liable for demurrage (s).

Case 6.—A ship was chartered to unload “in the usual and customary manner”; during her unloading the authorities stopped her discharge, and ordered her to leave her discharging berth. *Held*, that the charterers were not liable for such delay, for, as both parties were to concur in the act of unloading, the implied contract was that each would use reasonable diligence in performing his part; and the intervention of superior authority, which could not have been avoided by any diligence, excused both parties (t).

Case 7.—A vessel was chartered “to be discharged with all dispatch as customary.” By the custom of the port, all the work of discharge was done by a Dock Company. By a strike of the Company’s labourers, and without fault of the consignee, the discharge was delayed four days. *Held*, that the consignee was not liable (u).

Case 8.—A vessel was chartered to discharge at Hamburg, “at usual fruit berth, as fast as steamer can deliver as customary.” She reached a usual fruit berth on March 8, but owing to the crowded state of the warehouses into which the fruit must by the custom of the port be delivered by cranes, the warehouses and cranes being under control of the harbour authorities, her discharge did not begin till March 11. *Held*, as the delay arose without fault of the consignee and in the customary manner of discharge, he was not liable (x).

(r) *Rodgers v. Forrester* (1810), 2 Camp. 483; cf. *The Jaederen*, (1892) P. 351, where the clause was “as fast as ship can deliver,” and she could not get to a quay. See also *Hulthen v. Stewart*, (1903) App. Cas. 389.

(s) *Postlethwaite v. Freeland* (1880), 5 App. C. 599.

(t) *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 549. The remarks of Baron Martin shew that this decision must be limited to cases where no fixed time for loading has been stipulated for: see note (q), p. 358, ante; see also *Sjoerds v. Luscombe* (1812), 16 East, 201.

(u) *Castlegate S.S. Co v. Dempsey*, (1892) 1 Q. B. 854. Cf. *Weir v. Richardson* (1897), 3 Com. Cases, 20, and *The Kingsland*, (1911) P. 17.

(x) *Good v. Isaacs*, (1892) 2 Q. B. 555; cf. *Wyllie v. Harrison* (1885), 13 Sc. Sess. C. 92; *Lyle v. Cardiff*, (1900) 2 Q. B. 638.

Case 9.—A vessel was chartered to discharge in London, “the cargo to be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports.” She was ordered to the Surrey Dock, which was very crowded, and delay was caused by scarcity of quay berths and lighters. The charterers used all reasonable means to expedite the discharge. *Held*, they were not liable for demurrage (*y*).

Case 10.—A vessel was chartered to discharge at Cardiff, “with all dispatch as customary.” The custom of Cardiff is to discharge cargo in trucks on the quay. The trucks are provided by certain railways, with one of which the charterers arranged for waggons, but owing to a stress of work at the port, the supply of waggons failed, and the ship was delayed. The charterers did their best. *Held*, they were not liable for demurrage (*z*).

Case 11.—A vessel was chartered to discharge at Granton “with customary dispatch,” with a provision that time should not count during delay caused by a strike of any workmen essential to the discharge. There was a strike in the charterers’ yard, to which they would have taken the cargo in railway waggons from the quay. There was no strike at the quay and no lack of railway waggons, but the railway company, fearing detention of the waggons at the yard, would not supply them except for conveying cargo direct to purchasers. Delay in discharge resulted. *Held* (1), that the charterers had not discharged with customary dispatch; (2) that there was no strike of workmen essential to the discharge (*a*).

Article 134.—Who are liable for Demurrage on a Charter.

Where there is a charter containing express stipulations as to demurrage, there will be liable on it, for demurrage:—

(1.) The charterer (*b*), unless (A.) there is a cesser clause in the charter (*c*); and (B.) he has been freed by a new contract on the bill of lading (*d*).

(2.) The parties to the bill of lading, if the charter-party stipulations as to demurrage are expressly incor-

(*y*) *Hulthen v. Stewart*, (1903) App. Cas. 389.

(*z*) *Lyle v. Cardiff*, (1900) 2 Q. B. 638.

(*a*) *Dampskibsselskabet Svendborg v. Love* (1915), Sess. Cas. 543.
Cf. Langham S.S. Co. v. Gallagher (1911), 2 Ir. Rep. 348.

(*b*) See the cases on charterparty freight, Article 144.

(*c*) See Article 54; *cf. Hick v. Rodocanachi*, (1891) 2 Q. B. 626.

(*d*) *Gullischen v. Stewart* (1884), 13 Q. B. D. 317.

porated in the bill of lading (e); or persons taking goods without protest under such bill of lading (f). (See also Article 135).

Case 1.—A ship was chartered with the usual stipulations for freight, demurrage, and a cesser clause. The charterers shipped the cargo themselves, and accepted bill of lading, making the goods deliverable to themselves, at port of discharge, "they paying freight and all other conditions as per charter." In an action by shipowners against charterers as consignees under the bill of lading, for demurrage at the port of discharge, *Held*, that they were liable, as the bill of lading only incorporated those clauses of the charter which were consistent with its character as a bill of lading, and therefore, though it incorporated the provisions as to demurrage, did not incorporate the cesser clause (g).

Case 2.—C. chartered a ship from A., to pay a named freight, sixteen lay-days and demurrage at £2 per day. C. shipped a cargo consigned to G. in London, under a bill of lading, "paying freight as per charter," with a memorandum in the margin, "there are eight working days for unloading in London." G. was sued by A. for demurrage. *Held*, that as the bill of lading did not clearly shew that the conditions as to demurrage in the charter were incorporated in the bill of lading, G. was not liable (h).

Case 3.—Under a bill of lading of goods deliverable to G., "he paying for said goods as per charter, with primage and average accustomed," G. was *held* not liable for demurrage at the port of loading, due under the charter (i).

Case 4.—C. chartered a ship from A., "fifty running days to be allowed for loading, and ten days on demurrage over and above the said laying days at £8 per day," the owner to have a lien for demurrage; there was a cesser clause. C. shipped goods under a bill of lading, "to be delivered as per charter to G., he paying freight and all other conditions or demurrage as per charter." The ship was detained at her port of loading ten days on demurrage, and eighteen days besides. A. claimed a lien against G. for demurrage, and damages for detention. *Held*, that G. was liable for the demurrage, but not for the damages for detention, which were not clearly included in the bill of lading (k).

(e) They were held to be incorporated in *Porteus v. Watney* (1878), 3 Q. B. D. 535; *Wegener v. Smith* (1854), 15 C. B. 285; *Gray v. Carr* (1871) L. R. 6 Q. B. 522; not to be incorporated in *Chappel v. Comfort* (1861), 10 C. B. N. S. 802; *Smith v. Sieveking* (1855), 4 E. & B. 945. See as to words incorporating the charter, *Serraino v. Campbell* (1890), 25 Q. B. D. 501.

(f) *S.S. County of Lancaster v. Sharpe* (1889), 24 Q. B. D. 158.

(g) *Gullischen v. Stewart* (1884), 13 Q. B. D. 317.

(h) *Chappel v. Comfort* (1861), 10 C. B. N. S. 802.

(i) *Smith v. Sieveking* (1855), 4 E. & B. 945.

(k) *Gray v. Carr* (1871), L. R. 6 Q. B. 522.

Article 135.—Who are liable for Demurrage on a Bill of Lading.

Where there is an express stipulation as to demurrage contained in a bill of lading, demurrage due under it will be payable:—

- (1.) By the shipper or consignor (*l*);
- (2.) By every person presenting such bill of lading and demanding delivery under it (*m*), if the jury find from such demand an agreement in fact to pay it (*n*);
- (3.) Under the Bills of Lading Act (*o*), by every consignee named in the bill of lading to whom the property has passed by such consignment, or indorsee to whom the property has passed, either by indorsement, or by indorsement followed by delivery (*p*).

There is contained in every bill of lading an implied contract by the consignor to unload the goods in a reasonable time (*q*); on this contract the consignee named in the bill of lading, and an indorsee to whom the property has passed by the indorsement, will be, and the person taking delivery under such bill of lading may be,

(*l*) *Cawthron v. Trickett* (1864), 15 C. B. N. S. 754.

(*m*) *Per Cave, J.*, in *Allen v. Coltart* (1883), 11 Q. B. D. 782, at p. 785; *Palmer v. Zarifi* (1877), 37 L. T. 790; *Dobbin v. Thornton* (1806), 6 Esp. 16; *Jesson v. Solly* (1811), 4 Taunt. 52; *Stindt v. Roberts* (1848), 5 D. & L. 460; *Young v. Moeller* (1855), 5 E. & B. 755; *Wegener v. Smith* (1854), 15 C. B. 285; on which cases see *per Lord Selborne*, 10 App. C. p. 89. That such delivery is good consideration for a promise to pay demurrage, see *Scotson v. Pegg* (1861), 6 H. & N. 295; *Benson v. Hippus* (1828), 4 Bing. 455. See also Note 1 to this Article.

(*n*) *Sanders v. Vanzeller* (1843), 4 Q. B. 260. But not where the person presenting the bill at the same time repudiates any liability for demurrage under it or a charter incorporated in it: *S.S. County of Lancaster v. Sharpe* (1889), 24 Q. B. D. 158.

(*o*) 18 & 19 Vict. c. 111 (Appendix III.); see also *Allen v. Coltart*, *vide supra*, and Article 75.

(*p*) Where purchasers of a cargo took delivery from the ship, and after that was completed the bill of lading was indorsed to them (*i.e.*, indorsement followed delivery) they were held not liable for the demurrage payable under the bill of lading. *McKelvie v. Wallace* (1919), 2 I. R. 250.

(*q*) *Fowler v. Knoop* (1878), 4 Q. B. D. 299; *The Clan Macdonald* (1883), 8 P. D. 178; *Tillett v. Cwm Avon* (1886), 2 Times L. R. 675; 18 & 19 Vict. c. 111. The effect is to render the earlier cases, such as *Evans v. Forster* (1830), 1 B. & Ad. 118, of doubtful authority.

liable (*r*). On this implied contract the shipowner and not the master is entitled to sue (*s*).

Note 1.—*Scotson v. Pegg*, (1861) 6 H. & N. 295, has attained undue notoriety through being treated by writers on the principles of the law of contract as in doubtful accord with the doctrine of consideration. The terms of the judgments lend some colour to this view. But rightly understood the case raises no more difficulty than any of the cases cited in footnote (*m*) on p. 362, *supra*, or in footnote (*c*) on p. 409, *infra*. The claim against Pegg was clearly for the demurrage reserved by the bill of lading. If he had been indorsee of the bill of lading he would have been liable under sect. 1 of the Bills of Lading Act, 1855. Apparently he was not indorsee, but presented it (*query* indorsed in blank) and took delivery under it. On the facts so understood there is no difficulty in finding ample consideration for his implied promise to fulfil the terms of the bill of lading as to demurrage.

Note 2.—If there are a number of bills of lading, each stipulating for a fixed number of lay-days, and a fixed sum for demurrage, or each incorporating such stipulations from a charterparty, can the shipowner proceed against each of the indorsees or consignees and recover the whole amount from each? The cases of *Leer v. Yates* (*t*), *Straker v. Kidd* (*u*), and *Porteus v. Watney* (*x*) appear to shew that he can. This result, at first sight (*y*), seems so outrageous that much doubt upon the point has naturally been expressed. In the case of a demurrage clause incorporated from a charterparty there would seem to be a way out of the difficulty by holding that each holder of the bill of lading has undertaken that the stipulation of the charter-

(*r*) *Fowler v. Knoop* (1878), 4 Q. B. D. 299.

(*s*) *Brouncker v. Scott* (1811), 4 Taunt. 1; *Evans v. Forster* (1830), 1 B. & Ad. 118; *Cawthron v. Trickett* (1864), 15 C. B. N. S. 754, where the master, who was a part owner and managing owner, was held entitled to sue the consignor on the implied contract. The master, however, may sue on an express contract in the bill of lading for demurrage, as he can for freight: *Jesson v. Solly* (1811), 4 Taunt. 52; and see Article 147.

(*t*) (1811), 3 Taunt. 387.

(*u*) (1878), 3 Q. B. D. 223.

(*x*) (1878), 3 Q. B. D. 227, 534.

(*y*) There are considerations, however, which are pertinent on the side of the shipowner. If a charterer ships a cargo with an obligation in the charterparty as to its discharge in a certain time, and then, for the convenience of the charterer, many bills of lading for small parcels are issued, the shipowner (especially if there is the usual cesser clause) may have no practical means of enforcing his right to have the steamer discharged in proper time, if he be limited, as against each holder of a bill of lading, to his default in taking delivery of his own parcel.

party shall be fulfilled, *i.e.* that the shipowner shall receive the sum (*e.g.* £10 a day) named therein, and if the shipowner has received this from one consignee, another can contend that the obligation of the charterparty has been fulfilled so as to absolve him. This was a suggestion of Thesiger, L.J. (z), though it was not supported by the other members of the Court of Appeal. But if there is a separate contract expressed in each bill of lading—so many lay-days for discharge, and so much per day for demurrage—it is very difficult to see any escape from the liability of each and every holder or consignee for the whole amount. The conscience of the shipowner may be made easier if he sues all the consignees for the charterparty demurrage without claiming the whole amount from each of them (a). The defendants are not likely to raise the defence, which strictly is available to them, that their liability is several, not joint (b).

Case 1.—Goods were shipped under a bill of lading, with a memorandum, “ship to be cleared in sixteen days, and £8 per day demurrage to be paid after that time.” *Held*, that the consignee taking delivery of goods under such a bill of lading was liable to pay the demurrage (c).

Case 2.—A bill of lading, containing clauses as to demurrage, was pledged to I. for advances. I. took delivery of the goods under the bill of lading. *Held*, that I. was not liable under the Bills of Lading Act to pay demurrage merely by reason of the pledge of the bill of lading, but that he became liable by taking delivery of the goods under it (d).

Case 3.—C. chartered a ship from A., “to be discharged as fast as the custom of the port would allow,” and took bills of lading for the cargo, which did not refer to demurrage. There was no custom of the port of discharge. G., the consignee, had sold the beneficial interest in the goods to P., and gave a delivery order in his favour. *Held*, that G., as consignee, was liable on the implied contract in the bill of lading under the Bills of Lading Act (e):

(z) 3 Q. B. D. at p. 540.

(a) As was apparently done in *The Lizzie* (1918), 23 Com. Cas. 332, reversed in *H. L. sub. nom. Van Liewen v. Hollis*, (1920) A. C. 239.

(b) The U. S. Shipping Board has used a provision in bills of lading to this effect: “Cargo to be discharged at the rate of — tons per day, with demurrage £ — per day *pro rata* freights,” *i.e.*, the whole demurrage is to be apportioned among the holders of the bills of lading in proportion to the freight they severally have to pay. *Cf. U. S. Shipping Board v. Masters* (1922), 10 Ll. L. R. 573; *U. S. Shipping Board v. Baynes* (1922), 13 Ll. L. R. 572.

(c) *Jesson v. Solly* (1811), 4 Taunt. 52.

(d) *Allen v. Coltart* (1883), 11 Q. B. D. 782.

(e) *Fowler v. Knoop* (1878), 4 Q. B. D. 299.

SECTION X.

FREIGHT.

Article 136.—Freight; what it is.

“FREIGHT,” in the ordinary mercantile sense, is the reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition (*a*), ready to be delivered to the merchant (*b*). The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed (*c*), or, if not, whether its performance has been prevented by the act of the cargo-owner (*d*).

Under a simple contract to pay freight (*b*) no freight is payable if the goods are lost (*e*) on the voyage (*f*), or

(*a*) *Asfar v. Blundell*, (1896) 1 Q. B. 123.

(*b*) The definition of the Judicial Committee in *Kirchner v. Venus* (1859), 12 Moore, P. C. 361, at p. 390, is, “Freight is the reward payable to the carrier for the safe carriage and delivery of goods.” But *Dakin v. Oxley* (1864), 15 C. B. N. S. 646 (see p. 665), shews that safe carriage in the sense of delivery of goods in good condition is not necessary, and cases like *Cargo ex Argos* (1873), L. R. 5 P. C. 134, and *Cargo ex Galam* (1863), B. & L. 167, shew that actual delivery of goods is not essential, readiness to deliver sufficing.

(*c*) *Per Willes, J., Dakin v. Oxley* (1864), 15 C. B. N. S. 646, at p. 664; *Kirchner v. Venus* (1859), 12 Moore, P. C. 361, at p. 390, and Section XI., on Lien, *post*. Cf. *The Industrie*, (1894) P. 58.

(*d*) *Cargo ex Argos*, *vide supra*; *Cargo ex Galam*, *vide supra*; and Article 139.

(*e*) A guarantee of a gross freight of £900 will be payable if the freight is less than £900, though the vessel is lost on the voyage, as the breach occurs at the port of loading: *Carr v. Wallachian Co.* (1867), L. R. 2 C. P. 468.

(*f*) As to whether a charter includes one voyage or two, so that freight is payable for a part of the chartered services, though the ship is lost in performing the other part, see *Mackrell v. Simond* (1776), 2 Chit. 666. The clause “ship lost or not lost” is now very usual. This clause only refers to losses through excepted perils: *G. Indian Railway Co. v. Turnbull* (1885), 53 L. T. 325. Sometimes the clause “freight to be considered earned, ship lost or not lost, at any stage of the entire transit,” is found in through bills of lading; see Article 22.

for any other reason, except the fault of the merchant alone (*g*), are not delivered at the port of destination.

From the signing and delivery of bills of lading (*h*) while the goods are in course of carriage without unreasonable delay, and until they are delivered to the merchant, the master of the ship has a lien on them for the freight due for such carriage, and cannot be compelled to part with them till such freight is paid and the bills of lading delivered up (*i*).

These incidents of freight exist by rule of law, and do not need a bill of lading or other written contract between the parties to support them, though they may be excluded by such a written contract (*j*).

The term "freight" will be presumed to have its ordinary mercantile meaning (*k*), unless evidence is found in the charter or bill of lading, which negatives this, or

(*g*) See Article 139.

(*h*) *Tindall v. Taylor* (1854), 4 E. & B. 219, at p. 227; *Thompson v. Trail* (1826), 2 Car. & P. 334. And see Article 150, on Liens, *post*.

(*i*) *Dakin v. Oxley* (1864), 15 C. B. N. S. 646, at p. 664; *Kirchner v. Venus* (1859), 11 Moore, P. C. 368, at p. 390. It would perhaps be more accurate to say that during the voyage the master is entitled to keep the goods because by his contract he is entitled to carry them and earn freight, and that when he has performed the voyage and earned the freight he is entitled to hold them under the lien that then arises to enforce payment of the freight.

(*k*) *Krall v. Burnett* (1877), 25 W. R. 305; *Lewis v. Marshall* (1844), 7 M. & G. 729; *Blakey v. Dixon* (1800), 2 B. & P. 321. This will allow the introduction of usages of the particular trade, or practices of merchants creating rights between the parties to a contract in respect of some matter which is not in terms provided for by the contract; see *per* Willes, J., in *Meyer v. Dresser* (1864), 16 C. B. N. S. 646, at p. 662, and Article 8, *ante*. So *Brown v. Byrne* (1854), 3 E. & B. 703, where a custom at Liverpool as to discount from freight was held binding. See also *Russian Steam Navigation Co. v. De Silva* (1863), 13 C. B. N. S. 610; *The Norway* (1865), 3 Moore, P. C. N. S. 245. In *Meyer v. Dresser* (1864), 16 C. B. N. S. 646, evidence of a particular method of payment of freight, tendered as a "general custom of merchants," was rejected as a mere mode of carrying on business; and in *Kirchner v. Venus*, *vide supra*, evidence of custom as to freight was held inadmissible on the ground that one of the parties, being ignorant of it, could not have intended, or be presumed to have intended to be bound by it: *sed quære*; and see *Note, ante*, p. 30. In *Suart v. Bigland* (C. A. Jan. 24, 1886), "to pay out of freight collected," was held to mean out of gross, not nett, freight.

raises an ambiguity, when oral evidence may be given as to the intention of the parties (l).

Case 1.—Goods were shipped under a bill of lading with the words "Freight payable in London." Evidence was tendered that by the custom of the steam shipping trade this meant "freight payable in advance in London." *Held*, inadmissible, the word "freight" being well understood, and there being no words here to qualify it (m).

Case 2.—Evidence tendered to shew that the term "freight" in a charter, which also referred to "passage money," included the passage money of steerage passengers. *Held*, inadmissible (n).

Case 3.—Goods were shipped under a bill of lading, which was not produced at the trial; but the shipping card contained the words, "freight payable here." There was also tendered oral evidence of conversations as to this clause. *Held*, ambiguous as to the time of payment, the oral evidence admissible, and the nature of the actual contract a question for the jury (o).

Note 1.—"With *Primage and Average accustomed.*"—*Primage* was originally a small payment made by the merchant to the master for care and attention bestowed on his goods, for which the master could sue (p). By the master's agreement with the shipowner, *primage* may and usually does belong to the shipowner; and in that case the master cannot contract in the bill of lading that it should be paid to him (q). *Primage* at the present time is a percentage on the freight paid to the shipowner by the merchant: part of it is sometimes allowed to the merchant's shipping agent by the shipowner as his remuneration, being in effect a sort of commission. It is very rare to find a master receiving *primage* at the present day.

Average accustomed meant "petty average," which was also a gratuity to the captain. "Petty average" is even more obsolete than "*primage.*" Blount, *Law Dictionary*, 1670 (cited in Murray, N. E. D.), says: "*Average* is a little

(l) *Lidgett v. Perrin* (1861), 11 C. B. N. S. 362; *Andrew v. Moorhouse* (1814), 5 Taunt. 435; and see Article 8.

(m) *Krall v. Burnett*, *vide supra*. See also *Mashiter v. Buller* (1807), 1 Camp. 84, criticised by Brett, J., in *Allison's Case*, 1 App. C. at p. 218.

(n) *Lewis v. Marshall* (1844), 7 M & G. 729.

(o) *Lidgett v. Perrin* (1861), 11 C. B. N. S. 362, distinguishable from *Krall v. Burnett* by the special facts.

(p) *Charleton v. Cotesworth* (1825), R. & M. 175; *Best v. Saunders* (1828), M. & M. 208. See *Howitt v. Paul* (1878), 5 Sc. Sess. C., 4th Ser. 321.

(q) *Caughey v. Gordon* (1878), 3 C. P. D. 419.

Duty which those Merchants who send goods in another Man's ship, do pay to the Master of it, for his care over and above the Freight; for in Bills of Lading it is expressed—'Paying so much Freight for the said Goods, with Primage and Average accustomed'" (r). Molloy (*De Jure Maritimo*, 1676, p. 256) says of "Petty Averidge" that "the French ships commonly term the Gratuity *Hatt-money*."

Note 2.—Freight is usually payable, under a voyage charter, in accordance with the express provisions of the charter, thus: a certain proportion of the freight, or a certain lump sum on sailing; remainder on delivery, either by cash or by specified bills. If the charter is a round charter, or there are loading and discharging expenses in the course of the voyage, such disbursements are usually by the charter to be advanced against the freight by the charterers or their agents.

Where the charterers propose to put the ship up as a general ship, and the captain may sign bills of lading at a lower rate of freight than the charter, the shipowners usually protect themselves thus: "Any difference between charter and bill of lading freight to be settled at port of loading before sailing; if in vessel's favour to be paid in cash, at current rate of exchange less insurance; if in charterer's favour, by captain's draft, payable three days after ship's arrival at port of discharge" (s).

Note 3.—Stipulations as to the payment of freight in the bill of lading vary very much. It is very common to find the freight made due and payable "on shipment of the goods," or "in exchange for bills of lading," or "on or before the departure of the vessel." A very usual clause is "Freight for the said goods with primage to become due on shipment, and to be paid in London in cash without

(r) In Malynes, *Lex Mercatoria* (1686), p. 100, is a variant phrase: "With Primage and Petilodeminage." The latter word, according to the N. E. D., meant "Petty Lodemanage," and "Lodemanage" meant "Pilottage." But Malynes (*ibid.* p. 102) says: "Primage and Petilodeminage to the Master for the use of his Cables to discharge the goods." So Molloy (*De Jure Maritimo*, 1676, p. 255), "*Primage and Petilodemanage* is likewise due to the Master and Marriners for the use of his Cables and Ropes to discharge the Goods, and to the Marriners for loading and unloading of the Ship or Vessel, it is commonly about twelve pence per tun." Still earlier the phrase was more elaborate: "And all stowage, lowaige, wyndage, pety lodmanage, and averages accustomed shalbe taken and borne upon all the goods lade in the said shyppe this present viage" (charterparty dated July 3, 1531, printed in Marsden, *Select Pleas in the Court of Admiralty* (Selden Society, 1892), Vol. I. at p. 37).

(s) See *Ralli v. Paddington S.S. Co.* (1900), 5 Com. Cases, 125.

deduction, ship lost or not lost." Where the freight is to be paid on delivery it is sometimes secured thus: "Freight and primage for the said goods to be paid at destination, but, if the consignee for any reason, perils of the sea excepted, refuses to pay the same, shippers hereby undertake to pay amount here on demand," or "to be delivered after safe arrival at Z. to G., freight for the said goods as per margin being paid first in London." The clause "ship lost or not lost," almost always appears. A proviso is sometimes inserted for the payment of double freights on goods incorrectly described.

Article 137.—Advance Freight.

Where money is to be paid by the shipper to the shipowner before the delivery of the goods for ship's disbursements (t) or otherwise, such payment will be treated as an advance of freight, or as a loan, according to the intention of the parties, as expressed in the documents (u). A stipulation that it shall be paid "subject to insurance," or "less insurance," will indicate that the payment is an advance of freight (v).

If it is an advance of freight (x), it must be paid, though the goods are, after the due date of payment (y),

(t) Under a clause "Cash for disbursements to be advanced at port of loading on account of freight not exceeding £150 in all," the charterer is not entitled to advance the maximum sum named if the shipowner prefers to find the cash himself: *The Primula*, (1894) P. 128; see also *The Red Sea*, (1896) P. 20.

(u) *Allison v. Bristol Marine Insurance Co.* (1876), 1 App. C. 209, at pp. 217, 238, in which all the cases are discussed by Brett, J., and *Kirchner v. Venus* (1859), 12 Moore, P. C. 361, is explained.

(v) *Allison v. Bristol Co.* (1876), 1 App. C. at p. 229; *Hicks v. Shield* (1857), 7 E. & B. 663; *Jackson v. Isaacs* (1858), 3 H. & N. 405, in which the charterer was to deduct cost of insurance from advance freight; *Frayes v. Worms* (1865), 19 C. B. N. S. 159, in which it was held that general average on advance freight was to be paid by the charterer.

(x) A similar liability for freight, though not payable in advance or upon shipment, is often imposed by a clause in the bill of lading to this effect: "Freight to be considered earned, and must be paid, ship and/or cargo lost or not lost." Cf. Case 3 on p. 373.

(y) Cf. *Oriental S.S. Co. v. Tylor*, (1893) 2 Q. B. 518, where, the freight being due on signing bill of lading, it was held payable where the ship was lost before signing bill of lading, but after it should have been presented and signed; otherwise if the loss is before the due date

but before payment, lost by excepted perils, and it will not be recoverable from the shipowner if the goods are after payment so lost (z). It will be recoverable if the goods are lost by a peril not excepted (a), or if the shipowner has not fulfilled the condition precedent of the starting within a reasonable time of a seaworthy ship on the agreed voyage (b).

If advance freight be not paid at the time specified, there will not be a lien for it on the goods carried, without express stipulation (c).

Payments for ship's use by the person liable to pay freight, before such freight is due, without authority from the contract of affreightment, will be treated rather as loans than as prepayment of freight (d).

If the payment in advance is regarded as a loan by the shipper to the shipowner, whether on security of the freight or not (e), it is repayable, if freight to that amount be not due from the shipper, whether the ship be lost or not, and it cannot be insured by either party (f).

of payment. Thus in *Smith v. Pyman*, (1891) 1 Q. B. 742, where the freight was payable in advance, "if required," and the ship was lost before request, it was held the freight was not payable: and in *Weir v. Girvin & Co.*, (1900) 1 Q. B. 45, where the freight was payable three days after sailing and part of the cargo was burnt before sailing, it was held that freight was not payable on the cargo burnt.

(z) *Anonymous Case* (1684), 2 Shower, 283; *De Silvale v. Kendall* (1815), 4 M. & S. 37; *Byrne v. Schiller* (1871), L. R. 6 Ex. 20, 319; *Saunders v. Drew* (1832), 3 B. & Ad. 445. For the explanation of this rule, which is peculiar to English law, and probably arose from the long voyages of the East India trade, see Brett, J., at 1 App. C. 223.

(a) *G. Indian Peninsular R. Co. v. Turnbull* (1885), 53 L. T. 325; *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67; *Dufourcet v. Bishop* (1886), 18 Q. B. D. 373, in which the advance freight was in effect recovered as part of the damages for non-delivery of the goods.

(b) *Ex parte Nyholm, in re Child* (1873), 29 L. T. 634. Cf. *Smith v. Pyman*, (1891) 1 Q. B. 742, on the wording "one-third freight, if required, to be advanced."

(c) *How v. Kirchner* (1857), 11 Moore, P. C. 21; *Kirchner v. Venus* (1859), 12 Moore, P. C. 361; *Tamvaco v. Simpson* (1866), 19 C. B. N. S. 453, see the judgment of Willes, J.; *Ex parte Nyholm, in re Child* (1873), 29 L. T. 634; and see Articles 150, 155, 157, *post*.

(d) *Tanner v. Phillips* (1872), 42 L. J. Ch. 125; *The Salacia* (1862), 32 L. J. Adm. 43, and see Article 147, s. vii.

(e) It may not involve a set-off against the freight.

(f) *Watson v. Shankland* (1873), L. R. 2 H. L. Sc. 304; *Manfield v. Maitland* (1821), 4 B. & Ald. 582; *Allison v. Bristol Marine Insurance Co.* (1876), 1 App. C. 229, 253.

In the absence of anything in the contract to indicate a contrary result, a payment of advance freight is a payment on account of the whole sum which would otherwise be payable on the cargo delivered at destination: it is not to be treated as the total of proportionate advances of the agreed freight upon each ton of goods shipped (g).

Note.—The decision in *Allison v. Bristol Marine Ins. Co.* (g) was that the advance freight was not to be regarded distributively as a payment of so much per ton, leaving a balance per ton of the cargo delivered to be paid on delivery, but the advance was to be treated as a payment in advance of the whole amount payable on delivery. Thus if 500 tons are shipped at a freight of £2 a ton, and if £500 is paid as advance freight, and if on the voyage 250 tons are lost by an excepted peril, the shipowner must deliver the remaining 250 tons without receiving any payment for freight. He cannot say that the £500 was an advance of £1 upon each ton shipped, and therefore claim £250 as the balance of £1 per ton upon the 250 tons delivered: on the other hand, if 400 tons are lost on the voyage, the charterer cannot claim repayment of £300 of the advance of £500.

In *Allison's Case* the Courts apparently were only concerned with rights on the charterparty as between shipowner and charterer, or if there was a bill of lading in the hands of an indorsee from the charterer, it was only one bill for the whole cargo. The judges did not need to consider what would be the position if there were separate bills of lading for parts of the cargo, with the usual clause as to "freight payable as per charterparty," in the hands of different consignees. Thus suppose in the case put above two bills of lading were issued for the 500 tons shipped, the first for 300 tons in Hold No. 1 stating that £300 has been paid as advance freight, and that balance of freight is payable on delivery as per charterparty; and the second for 200 tons in Hold No. 2 stating that £200 has been paid as advance freight, and with the same clause. On the voyage 250 tons out of Hold No. 1 are lost. Presumably the shipowner, on delivering 50 tons to the holder of the first bill of lading, can recover no further freight from him: for more than £2 a ton on 50 tons has been paid in advance. But from the holder of the second bill of lading, to whom he delivers his

(g) *Allison v. Bristol Mar. Ins. Co.* (1876), 1 App. Cas. 209.

full 200 tons, the shipowner can surely claim £200, since that is £2 a ton on the 200 tons delivered less £200 paid in advance. In the result the shipowner on the whole voyage would get £700, *i.e.* £500 as advance freight, and £200 from the second consignee at the port of delivery. But on the charterparty alone and from the charterer, if he had not indorsed any bills of lading, he would only have got £500 altogether, as is stated above. It is difficult to see how, when bills of lading are issued for parts of the cargo, the advance freight can fail to become distributive at least in regard to the quantities under each bill of lading. For there seems no ground on which the holder of the second bill of lading could assert that he need pay no freight on delivery. His contract in the bill of lading is surely to pay £2 a ton on the 200 tons delivered to him less that part of the £500 paid in advance, which must be treated as advance freight on his goods.

Case 1.—Goods were shipped under a charter “to be delivered on being paid freight £5 per ton delivered . . . Cash for ship’s disbursements to be advanced to the extent of £300, free of interest, but subject to insurance . . . The freight to be paid on unloading and right delivery of cargo as follows, in cash, less two months’ interest at 5 per cent., and if required £300 to be paid in cash on arrival at port of loading, less two months’ interest.” D., agent for the charterer, C., advanced £300; the ship was lost on the voyage, and C. claimed £300 from A., the shipowner, as a loan. *Held*, that the charter, and the provision for insurance, shewed conclusively that the advance was for freight, and not as a loan, and therefore could not be recovered, though the ship was lost (*h*).

Case 2.—A ship was chartered, “freight to be paid thus: £1200 to be advanced the master by freighter’s agents at X., and to be deducted with $1\frac{1}{4}$ per cent. commission on the amount advanced, and cost of insurance from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge, in cash . . . the master to sign bill of lading at any current rate of freight required without prejudice to the charter, but not under chartered rates unless the difference be paid in cash.” The shippers paid the £1200, and required the master to sign bills of lading under chartered rates, putting off the payment in cash of the difference, £700, by excuses. The ship was lost on the voyage. *Held*, the £1200 could not be recovered back from the shipowners, and the shipowners could recover the £700, the intention being

(*h*) *Hicks v. Shield* (1857), 7 E. & B. 633. See also *Allison v. Bristol Insurance Co.*, *vide supra*; and for a curious case of advance freight, see *The Thyatira* (1888), 8 P. D. 155.

that it should be advance of freight, payable whether the ship was lost or not (i).

Case 3.—Goods were shipped under a charter, “Four-fifths of freight calculated on quantity shipped to be advanced and paid in cash in one month, from the vessel’s sailing from her last port in Great Britain, steamer lost or not lost.” The excepted perils did not include the master’s negligence. She sailed July 12, and was lost through the negligence of her master on July 19, the loss being known on July 21; on July 26 the freighter paid four-fifths of freight to the charterer. *Held*, that the freighter could recover such payment, as “lost or not lost” only referred to losses by excepted perils, and not to a loss by master’s negligence (k).

Case 4.—Goods were shipped under a charter, “freight to be paid, half in cash on unloading and right delivery of cargo, and the remainder by bill in London at four months’ date. The captain to be supplied with cash for ship’s use.” Under the last clause, the master drew a bill for £219 on the freighters, which was accepted and paid. The ship was lost on the voyage. *Held*, that the sum of £219 was a loan, repayable by the shipowner whatever the result of the voyage, and consequently not insurable by the charterer (l).

Case 5.—Goods were shipped under a charter, “Sufficient cash for ship’s disbursements to be advanced, if required, to the captain by charterers (C.) on account of freight at current rate of exchange subject to insurance only.” The whole freight was £735. C. advanced at X. £160, being allowed £5 for insurance. C. did not insure the £160. The ship was lost by perils not excepted, and C. claimed to recover £8500, the price for which the goods were sold “to arrive,” less £575 balance of freight. The shipowners claimed to deduct £735, the whole freight. *Held*, they were not entitled to do so, as C.’s damage was the amount he would have to receive less the amount he would have to pay, on arrival of the goods (m).

Case 6.—Under a charter, with a clause “One-third freight, if required to be advanced, less 3 per cent. for interest and insurance,” the ship sailed and was wrecked on her voyage. After the wreck, the shipowner “required” payment for the first time of one-third freight. *Held*, that the charterer was under no liability to pay advance freight till requirement by the shipowner, and that this requirement could not be made when the voyage could not be performed (n).

Case 7.—C. chartered a ship from A. to carry cargo from X. to Z. at a freight per ton delivered, the freight to be payable in

(i) *Byrne v. Schiller* (1871), L. R. 6, Ex. 20, 319. That the shipowners would have no lien for such a difference without an express agreement, is shown by *Gardner v. Trechmann* (1884), 15 Q. B. D. 154.

(k) *G. Indian Pen. R. Co. v. Turnbull* (1886), 53 L. T. 325.

(l) *Manfield v. Maitland* (1821), 4 B. & Ald. 582.

(m) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67. See *Dufourcet v. Bishop* (1886), 18 Q. B. D. 373.

(n) *Smith v. Pyman*, (1891) 1 Q. B. 742; but see *Oriental S.S. Co.*

cash, less 3 per cent., at X., before sailing, on signing bills of lading. The charter also provided that if the bill of lading freight did not amount to the chartered freight the difference was to be paid in cash on clearing. Before the vessel was fully loaded at X., and therefore before all the bills of lading were signed, the vessel caught fire, sank, and could not sail. A. claimed from C. the charterparty freight on all the bills of lading that had been issued. C. refused to pay A. anything. *Held*, that as and when each bill of lading was signed a proportional part of the charterparty freight was payable by C. to A. (o).

Article 138.—Back Freight.

When the ship is either ready to deliver cargo at the port of destination, or is prevented by excepted perils from reaching such port (*p*), but the merchant does not take delivery or forward instructions within a reasonable time, the master if he does not tranship in the interests of the shipowner (*q*), has the power and duty to deal with the cargo in the owner's interest at the owner's expense. He may land and warehouse it, or, if this is impracticable, may carry it in his ship, or forward it in another ship to such place as may be most convenient for its owner, and can charge the owner with remuneration for and expenses of such carriage under the name of "*back freight*" (*r*).

Case.—Oil was shipped from X. to Havre, under a bill of lading, "Goods to be taken out within twenty-four hours after

v. Tylor, (1893) 2 Q. B. 518, where in the clause "one-third of the freight to be paid on signing bill of lading," it was held recoverable, where shippers had delayed presenting bill of lading till after ship had sunk, and then refused to present it or pay advance freight, as damages for not presenting bills of lading.

(o) *Coker v. Limerick S.S. Co., Ltd.*, (1918) 87 L. J. K. B. 767.

(p) *Semble*, that the shipowner can here also recover similar expenses and back freight incurred in interests of cargo owner; *vide Notara v. Henderson* (1870), L. R. 5 Q. B. 346, and Articles 101, 103. Where the voyage is prevented by its illegality, back freight may be recoverable where such illegality was not known to the shipowner, but not where it was: *Heslop v. Jones* (1787), 2 Chit. 550.

(q) Article 103.

(r) *Cargo ex Argos* (1873), L. R. 5 P. C. 134, settling the doubt of Mansfield, C.J., in *Christy v. Row* (1808), 1 Taunt. 300, at p. 316. See Article 126.

arrival." On reaching Havre the landing of oil was forbidden; attempts to land it at other ports near failed. The ship returned to Havre, transhipped the oil into lighters in the harbour, unloaded the rest of the cargo, reshipped the oil and brought it back to X. The shipper made no request for the delivery of the goods at Havre. *Held*, that the shipowner was entitled to the freight and expenses of the return journey to X. as well as the original freight from X. to Havre (r).

Dead Freight.

See Article 161, *post*.

Article 139.—Shipowner's Right to Full Freight.

The shipowner is entitled to the full freight in the charter or bill of lading:—

1. When he delivers the goods in a merchantable condition (t), at the port of destination (v), or is ready to deliver them, but the consignee does not take delivery within a reasonable time (v).

2. Where a lump sum as freight has been stipulated for, and he has delivered, or is ready to deliver, some part of such goods (x).

3. Where, the necessity of transhipment having arisen, he has transhipped, and so caused the goods to be delivered, even though at a less freight than that originally contracted for (y).

4. Where he has been prevented from delivering the goods solely by the default of the freighter, as in refusing to accept delivery at the port of destination (z),

(t) *Asfar v. Blundell*, (1896) 1 Q. B. 123.

(u) Delivery need not be to the consignee, if it is in a manner approved by him: see *Fenwick v. Boyd* (1846), 15 M. & W. 632.

(v) *Duthie v. Hilton* (1868), L. R. 4 C. P. 138, at p. 143; *Cargo ex Argos* (1873), L. R. 5 P. C. 134; and *per* Lord Mansfield, in *Luke v. Lyde* (1759), 2 Burr. 883.

(x) *Vide* Article 140.

(y) *Shipton v. Thornton* (1838), 1 P. & D. 216; *Matthews v. Gibbs* (1860), 30 L. J. Q. B. 55, is not inconsistent with this, but turns on specific facts; and see Article 103.

(z) *Cargo ex Argos* (1873), L. R. 5 P. C. 134.

or in requiring delivery of the goods at an intermediate port (a), or in refusing to name a safe port to which the ship can proceed, and enter (b).

Case 1.—F. shipped cement under a bill of lading: "Freight to be paid within three days after the arrival of ship before the delivery of any portion of the goods specified in this bill of lading." The vessel arrived, but on the day of arrival a fire accidentally arose which necessitated the scuttling of the ship, and the cement was so acted upon by water as to cease to exist as cement. *Held*, that the master must be ready to deliver before freight was payable, and therefore no freight was due (c).

Case 2.—F. shipped petroleum on A.'s ship to be delivered at Havre, to be taken by F. within twenty-four hours of ship's arrival at Havre. At H. the port authorities refused to allow the petroleum to be landed or the ship to come to the ordinary place of discharge in the port. The ship was allowed to anchor in the outer port, and F. could have taken delivery of the petroleum there into lighters. F. made no application of any sort for the goods to the ship. *Held*, that A. had done all that was required on his part, and was entitled to full freight (d).

Case 3.—F. shipped goods from X. to Z. on the French ship S. During the voyage, owing to sea damage the vessel put into Y. French law requires "a certificate of innavigability" before the voyage could be abandoned. Before the legal process of obtaining this certificate was completed, F. arrested the ship, and obtained the cargo without the master's consent. *Held*, that as the reasonable time allowed the master in which to tranship or repair had not expired, F. had no right to seize the cargo, and was liable for the whole freight (e).

Case 4.—C. chartered A.'s ship to carry a cargo from X. to Z. Unknown to A. there was a *respondentia* bond on the cargo. On the voyage to Z. the ship was stranded at Y., and while there the cargo was seized by the bondholder and sold, C. not interfering. *Held*, that as A. was prevented from carrying to Z. by the act of C., he was entitled to full freight to Z. (f).

(a) *The Bahia* (1864), B. & L. 292; *Cargo ex Galam* (1863), B. & L. 167; *The Soblomsten* (1866), L. R. 1 A. & E. 293; *Luke v. Lyde* (1759), 2 Burr. at p. 888.

(b) *The Teutonia* (1872), L. R. 4 P. C. 171. Cf. *Aktieselskabet Olivebank v. Dansk Fabrik*, (1919) 2 K. B. 162.

(c) *Duthie v. Hilton* (1868), L. R. 4 C. P. 138; *Asfar v. Blundell*, (1896) 1 Q. B. 123 (dates).

(d) *Cargo ex Argos* (1873), L. R. 5 P. C. 134.

(e) *The Bahia* (1864), B. & L. 292. If the goods owner tenders full freight at an intermediate port, the master is bound to deliver: *The Patria* (1863), L. R. 3 A. & E. 436; *Blasco v. Fletcher* (1863), 14 C. B. N. S. 147, turns on a special authority from the master.

(f) *Cargo ex Galam* (1863), B. & L. 167. See also *The Soblomsten* (1866), L. R. 1 A. & E. 293.

Case 5.—A German vessel was chartered to proceed to Y. for orders, and thence to a safe port as ordered in Great Britain, or on the continent between Havre and Hamburg. On reaching Y. the ship was ordered to Dunkirk, then safe, but before the ship's arrival there, owing to war between France and Germany, the vessel could not safely enter, and accordingly proceeded to Dover. The charterers required her to proceed to Dunkirk, and refused to name any other port, or to pay freight at Dover. *Held*, that as the charterers had failed to name a port safe on arrival, the ship was discharged from the necessity of completing her voyage, and the shipowner was entitled to full freight at Dover (*g*).

Article 140.—Lump Freight.

Lump freight is a gross sum stipulated to be paid for the use of the entire ship; it will, therefore, be payable if the shipowner be ready to perform his contract, though no goods are shipped, or though part of the goods shipped is not delivered. If any goods are shipped, some must be delivered to entitle the shipowner to lump freight (*h*).

If there is a charterparty for a cargo at a lump freight, and bills of lading for separate parcels provide that freight shall be payable as per charterparty, each holder of a bill of lading will be liable for such propor-

(*g*) *The Teutonia* (1872), L. R. 4 P. C. 171. Cf. *Aktieselskabet Olivebank v. Dansk Fabrik*, (1919) 2 K. B. 162.

(*h*) *The Norway* (1865), 3 Moore, P. C. N. S. 245; *Robinson v. Knights* (1873), L. R. 8 C. P. 465; *Merchant Shipping Co. v. Armitage* (1873), L. R. 8 C. P. 469; L. R. 9 Q. B. 99. Dr. Lushington in *The Norway*, 12 L. T. 56, had expressed the opinion that where short delivery of goods was not due to excepted perils, the freighter might deduct *pro rata* freight for the goods not delivered, though he could not deduct their value, nor could he deduct the freight if the short delivery were due to excepted perils. The Judicial Committee, reversing him on the question of fact, held that the short delivery was due to excepted perils, but also said: "We do not mean to express an opinion that even if the jettison and sale had been attributable to the negligence of the master there ought to be a deduction. Perhaps, in this case, the proper remedy of the shipper would have been by a cross-action." Coleridge, C.J., expresses a doubt whether this is correct in *Merchant Shipping Co. v. Armitage*, at L. R. 9 Q. B. p. 107. Most of the cases as to lump freight are considered in *Thomas v. Harrowing S.S. Co.*, (1915) A. C. 58.

tion of the lump freight as his parcel bears to the whole cargo shipped (i).

Note.—The delivery of some of the goods which entitles the shipowner to the whole lump freight may be delivery (a) in the chartered ship, or (if the use of such substituted method is permissible in the circumstances and under the charterparty) (b) in a substituted ship, or (c) by other means, *e.g.* by carting them to the port of destination from the wreck of the chartered ship (j).

In *S.S. Heathfield v. Rodenacher* (k) a ship was guaranteed by owners to carry 2600 tons dead weight; and the charterer contracted to load a full and complete cargo at a named rate "all per ton dead weight capacity as above." The ship could carry 2950 tons, and the Court of Appeal held freight payable at the named rate on 2950 tons: *sed quære*. In *S.S. Rotherfield v. Tweedy* (l), the charterers, in a Danube berthnote, agreed to load a full cargo of wheat at a named rate per ton on the guaranteed dead weight capacity of 4250 tons. "Owners guarantee steamer can carry 4250 tons dead weight." The ship carried a full cargo of 3950 tons, which with bunkers made up the 4250 tons guaranteed. *Held*, freight was only payable on 3950 tons. Both these cases seem to strike out of the charters part of their provisions.

Case 1.—A ship was chartered to load a full cargo, proceed to Z., and there deliver the same on being paid "a lump freight of £315." On the voyage, part of the cargo, properly loaded, was lost through perils of the sea. *Held*, that on delivery of the remainder, the full freight of £315 was payable (m).

Case 2.—A ship was chartered to load a full cargo, and proceed to Z. and discharge there. "A lump sum freight of £5000 to be paid after entire discharge and right delivery of the cargo in cash." Part of the cargo was during the voyage lost by fire. *Held*, that on delivery of the remainder of the cargo the shipowner was entitled to £5000 (n).

(i) *Brightman v. Miller* (1908), *Shipping Gazette*, June 6, 1908; *cf.* and contrast *Red "R." S.S. Co. v. Allatini* (1908), 14 Com. Cas. 82, 303.

(j) *Thomas v. Harrowing S.S. Co.*, (1915) A. C. 58.

(k) (1896), 2 Com. Cases, 55.

(l) (1897), 2 Com. Cases, 84.

(m) *Robinson v. Knights* (1873), L. R. 8 C. P. 465.

(n) *Merchant S. Co. v. Armitage* (1873), L. R. 9 Q. B. 99. Compare and contrast the effect of similar words where freight was not a lump freight: *London Transport Co. v. Trechman*, (1904) 1 K. B. 635.

Case 3.—A ship was chartered to load a full cargo of pit props and carry them to Z. at a lump sum freight. There was an exception of “perils of the seas.” When nearly arrived at Z. the ship was driven ashore and wrecked. Part of the cargo was collected on the beach, and the shipowner had it carted to the dock at Z. *Held*, that the shipowner was entitled to recover the whole lump sum freight (o).

Article 141.—Full Freight for Delivery of Damaged Goods, or for Short Delivery.

The shipowner will be entitled to full freight:—

1. If he is ready to deliver in substance at the port of destination the goods loaded, though in a damaged condition. The freighter will not be entitled to make a deduction from the freight for the damage, but will have a separate cause of action for it, if it was not caused solely by excepted perils, or by the vice of the goods themselves. The question is whether the substance delivered is identical commercially with the substance loaded, though it may have deteriorated in quality (p).

Case 1.—Coal shipped under a charter had by the negligence of the master so deteriorated in quality as not to be worth its freight. The charterer therefore abandoned it to the shipowner and claimed to be discharged from freight. *Held*, he was not entitled to abandon, and was liable for the whole freight, his remedy being by cross-action (q).

Case 2.—Dates shipped under a lump-sum charter were under water for two days in the Thames. They were condemned by the Sanitary Authority as unfit for human food, and were unmerchandise as dates. They, however, looked like dates, and were of considerable value for distillation into spirit. *Held*, by the Court of Appeal, that as the thing delivered was not in a business sense the thing shipped, no freight was payable (r).

(o) *Thomas v. Harrowing S.S. Co.*, (1915) A. C. 58.

(p) *Dakin v. Oxley* (1864), 15 C. B. N. S. 646, *per* Willes, J., at pp. 664, *et seq.*; *Melhuish v. Garrett* (1858), 4 Jur. N. S. 943; *Shields v. Davis* (1815), 6 Taunt. 65; *Asfar v. Blundell*, (1896) 1 Q. B. 123.

(q) *Dakin v. Oxley*, *vide supra*.

(r) *Asfar v. Blundell*, (1896), 1 Q. B. 123. *Quære* whether this decision was right; the consignees took the cargo and sold it for £2400. Perhaps they could not have been compelled to take delivery, but, if they did, it is submitted they ought to pay freight. The

2. On a contract for a lump sum as freight, the shipowner is entitled to full freight, though he delivers less goods than the quantity named in the bill of lading, if he delivers all that were loaded (*s*), Statements of contents or weight contained in the bill of lading are binding against the shipper or consignee for the purposes of freight, if the goods are delivered as received (*t*).

Case 1.—A bill of lading shewed 300 tons to be shipped at a lump sum freight; only 217 tons were delivered. On proof that no more had been loaded; *held*, that the whole lump sum freight was due (*u*).

Case 2.—A ship was chartered to pay freight at 7*s.* per quarter delivered to consignee, but, if any part was delivered damaged, freight should be paid at captain's option, either on invoice quantity loaded as per bill of lading, or half freight on damaged portion. Eighty quarters were damaged, and the captain elected to receive full freight on the bill of lading amount. This was "2368 quarters, quantity and quality unknown," but only 2266 quarters were delivered. *Held*, that the shippers were liable to pay on the bill of lading amount (*v*).

distinction between *Melhuish v. Garrett*, *vide supra*, and *Duthie v. Hilton* (1868), L. R. 4 C. P. 138, where cement was affected by water, so as to become a solid mass, and it was held that no freight was due, is presumably that the substance there was something different from the substance loaded, though the brick-dust and the solid cement would seem equally useless to the shipper. Willes, J., in *Dakin v. Oxley*, at p. 667, puts the question thus: "What was the thing for the carriage of which freight was to be paid, and whether that thing, or any and how much of it, has substantially arrived."

(*s*) *Davidson v. Gwynne* (1810), 12 East, 381; *Blanchet v. Powell* (1874), L. R. 9 Ex. 74; *Meyer v. Dresser* (1864), 16 C. B. N. S. 646; *The Norway* (1865), 3 Moore, P. C. N. S. 245; *Jessel v. Bath* (1867), L. R. 2 Ex. 267. By express agreement the cargo owner may have a right to deduct the cost of cargo short delivered from the freight, as in *S.S. Garston v. Hickie, Borman & Co.* (1886), 18 Q. B. D. 17, where the clause was: "less cost of cargo delivered short of bill of lading quantity."

(*t*) *Tully v. Terry* (1873), L. R. 8 C. P. 679. See also *Covas v. Bingham* (1853), 2 El. & B. 836. They may by agreement be made binding as against the shipowner: *Lishman v. Christie* (1887), 19 Q. B. D. 393, where the clause was: "the bill of lading to be conclusive evidence of the quantity received, as stated therein." Cf. *Mediterranean Co. v. Mackay*, (1903) 1 K. B. 297; and *Crossfield v. Kyle S.S. Co.*, (1916) 2 K. B. 885.

(*u*) *Blanchet v. Powell* (1874), L. R. 9 Ex. 74.

(*v*) *Tully v. Terry*, *vide supra*. See also *Jessel v. Bath* (1867), L. R. 2 Ex. 297.

Article 142.—Freight pro rata for Short Delivery.

* If the shipowner, contracting to load a full cargo, only loads and carries part of it (*x*), or if, having loaded a full cargo, he only delivers part of it, he will, in the absence of a stipulation for lump freight (*y*), only be entitled to freight *pro rata* on the quantity delivered; and the freighter can counter-claim for short delivery not solely caused by excepted perils, or by the vice of the goods themselves (*z*).

Note.—Where, after shipment, part of a cargo is burnt, there being an exception of fire, the shipper is relieved from replacing it, or from paying freight on it; the shipowner is not entitled to demand freight on it, or fresh cargo in its place, but may himself furnish fresh cargo in its place, on which he will be entitled to freight. His right to ship fresh cargo appears to arise whether the freight is a lump freight or per ton (*a*).

Case.—A ship was chartered to proceed to X. and there load a complete cargo of hemp, and proceed to Z. and deliver the same on being paid freight at £5 per ton. A complete cargo was not loaded. *Held*, that the shipowner could recover freight *pro rata* on the quantity delivered, and the freighter had a cross-action for failure to load a complete cargo (*b*).

(*x*) *Ritchie v. Atkinson* (1808), 10 East, 295.

(*y*) Willes, J., suggests in *Dakin v. Oxley*, *vide infra*, an exception if the delivery of the whole cargo is made a condition precedent to the payment of any freight; but such a case is rare. At Grimsby there is a custom in the timber trade that no freight is payable till complete delivery of the cargo: *Stephens v. Wintringham* (1898), 3 Com. Cases, 169.

(*z*) *Dakin v. Oxley* (1864), 15 C. B. N. S. at p. 665; *The Norway* (1865), 3 Moore, P. C. N. S. 245; *Spaight v. Farnworth* (1880), 5 Q. B. D. 115; *Mediterranean Co. v. Mackay*, (1903) 1 K. B. 297; as to French law, see *Blanchet v. Powell* (1874), L. R. 9 Ex. 74; as to Prussian law and usage, see *Meyer v. Dresser* (1864), 16 C. B. N. S. 646.

(*a*) *Aitken Lilburn v. Ernsthauseu*, (1894) 1 Q. B. 773 (C. A.); *Weir v. Girvin & Co.*, (1900) 1 Q. B. 45 (C. A.).

(*b*) *Ritchie v. Atkinson* (1808), 10 East, 295.

Article 143.—Freight pro rata for Delivery short of Place of Destination.

A contract to carry goods for freight payable at the agreed destination is a contract "to do an entire work for a specific sum" (c). Accordingly, the shipowner "can recover nothing unless the work be done, or unless it can be shewn that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract" (c).

It follows that if the contract is governed by English law (d), where the shipowner delivers the goods to the merchant short of the port of destination, he can only claim freight proportional to the amount of voyage completed, known as freight *pro rata itineris peracti*, or freight *pro rata*, if an express or implied agreement to that effect exists with the merchant (e); or secondly, on a claim for damages, if he has by the act of the cargo-owner been prevented from completing the carriage to the agreed destination (f).

An agreement to pay *pro rata* freight will not be implied from the mere fact that the merchant receives his goods at the request of the shipowner at an intermediate port (g).

To justify a claim for *pro rata* freight there must be such a voluntary acceptance of the goods by their owner, at a port short of their final destination, or such a dealing, or neglect to deal with them there, as to raise a fair inference that the further carrying of the goods, (the

(c) Blackburn, J., *Appleby v. Myer* (1867), L. R. 2 C. P. at p. 661.

(d) For a foreign ship under English charter, see *The Industrie*, (1894) P. 58; *The Patria* (1871), L. R. 3 A. & E. 436.

(e) *Osgood v. Groning* (1810), 2 Camp. 466; *The Newport* (1858), Swabey, 335; *Luke v. Lyde* (1759), 2 Burr. 882; *Dakin v. Oxley* (1864), 15 C. B. N. S. 646, at p. 665.

(f) See par. 4 of Article 139. *Aktieselskabet Olivebank v. Dansk Fabrik*, (1919) 2 K. B. 162, is a good example of such a claim.

(g) *The Soblomsten* (1866), L. R. 1 A. & E. 293; *Cook v. Jennings* (1797), 7 T. R. 381; *Metcalf v. Brit. Iron Works* (1877), 2 Q. B. D. 423; *Thornton v. Fairlie* (1818), 8 Taunt. 354.

shipowner having a right to carry them further), was intentionally dispensed with by the goods-owner (*h*).

Thus where the goods are arrested, and the goods-owner, knowing of their arrest, takes no step to release them, and allows them to be sold, a claim for *pro rata* freight arises (*i*). But where the shipowner has no longer a right to carry on, as where he abandons the ship and cargo (*j*), or where he delays repairs or transshipment beyond a reasonable time, the goods-owner, who receives his goods, will not thereby give the shipowner any claim for freight *pro rata* (*k*).

A sale by the master, though justifiable in the interests of the cargo, gives him no claim for *pro rata* freight, if the goods-owner has not been consulted, whether such consultation was possible or not (*l*), or, having been consulted, has not acquiesced (*m*).

(*h*) *Osgood v. Groning*, *vide supra*; *The Newport*, *vide supra*; *Christy v. Row* (1808), 1 Taunt. 299; *Liddard v. Lopes* (1809), 10 East, 526; *Mitchell v. Darthez* (1836), 2 Bing. N. C. 555.

(*i*) *The Soblomsten* (1866), L. R. 1 A. & E. 293; Lord Mansfield's remark in *Luke v. Lyde* (1759), 2 Burr. 882, at p. 888, that "If the merchant abandons all, he is excused freight, and he may abandon all though they are not all lost," must be read with the comments of Willes, J., in *Dakin v. Oxley* (1864), 15 C. B. N. S. 646, at p. 665, who substitutes "decline to accept" for "abandon"; in which case the goods-owner, by declining to accept his goods short of the place of destination at *pro rata* freight, will compel the master either to carry or send them on at the full freight (see Articles 103, 138, 139), or to give them up to their owner there, without requiring any freight.

(*j*) *The Cito* (1881), 7 P. D. 5. If the shipowner, having abandoned ship and cargo so as to put an end to the contract of affreightment, afterwards regains possession from salvors, he will not thereby revive the contract or regain any right to freight: *The Arno* (1895), 8 Asp. M. C. 5. On this see now *Bradley v. Newsum*, (1919) A. C. 16. To constitute abandonment there must be neither intention to return, nor hope of recovery. The decision of the majority of the House of Lords that the facts in that case were not abandonment, and that full freight was still payable when the abandoned ship was brought in, will startle at any rate some commercial lawyers, who will prefer the dissentient judgment of Lord Sumner.—(T. E. S.)

(*k*) *The Kathleen* (1874), L. R. 4 A. & E. 269; *The Cito* (1881), 7 P. D. 5 (C. A.); *The Leptir* (1885), 52 L. T. 768; *The Arno*, *v. s.*

(*l*) *Vlierboom v. Chapman* (1844), 13 M. & W. 230; *Hopper v. Burness* (1876), 1 C. P. D. 137; *Acatos v. Burns* (1878), 3 Ex. D. 282 (C. A.).

(*m*) *Hill v. Wilson* (1879), 4 C. P. D. 329. To render himself liable, to *pro rata* freight, the goods-owner, having had an option of having the goods sent on to their destination, or of accepting them at the

Case 1.—A ship was chartered from X. to Z., but was prevented from reaching Z. by “restraints of princes.” The consignees requested the master to deliver at Y. into their lighters, and he delivered part of the cargo there. *Held*, that freight *pro rata* was due for the part of the cargo delivered at Y. (n).

Case 2.—A chartered vessel on the voyage became disabled, and was on October 2 towed into an English port, where she and the cargo were arrested in a salvage suit on October 7. The master took the necessary steps to defend the suit, but on October 24 abandoned the vessel; the owners of the cargo had been informed of the suit, and of the probable sale of the cargo, but gave no instructions. The cargo was sold by the order of the Court. *Held*, that the owners of the cargo by their inaction had waived their right to have the voyage completed at a time when the master had not lost his right to tranship, and that the cargo owners were therefore liable to pay *pro rata* freight (o).

Case 3.—A ship was chartered to sail from X. to Z.; owing to restraint of princes she was unable to proceed, and put back to Y.; the charterers refused to accept the cargo at Y.; the shipowner unloaded it after notice to the charterers, and it was sold by consent without prejudice to questions in dispute. *Held*, that there was no liability in the charterers to pay freight *pro rata* (p).

Case 4.—A ship was chartered to proceed to Taganrog and deliver cargo. Owing to ice in the Sea of Azof she could get no further than Kertch, 300 miles by sea from T., and would have had to wait till the spring to complete her voyage. The captain proposed to discharge the cargo; the consignees objected. The captain delivered the cargo to the custom-house at Kertch, claiming a lien on it for freight; the custom-house gave it up to the consignees, who gave the captain a receipt for it, but declined to pay freight. *Held*, that the shipowner was not entitled to full freight, for he had not completed the voyage, nor to *pro rata* freight, for there was no express or implied contract to pay it (q).

Case 5.—C. chartered a ship to carry a cargo from X. to Q. and deliver it; to load another cargo at Q. and carry it to Z., the

intermediate port, must accept the goods at the intermediate port: *Hill v. Wilson*, at p. 335. See also *Blasco v. Fletcher* (1863), 14 C. B. N. S. 147. *Semble*, however, that, while the captain must protect the interests of the goods, he should also protect the interests of the ship, and should not let the goods go without the payment of *pro rata* freight.

(n) *Christy v. Row* (1808), 1 Taunt. 299.

(o) *The Soblomsten* (1866), L. R. 1 A. & E. 293. *Semble*, the shipowner was entitled to full freight, as the master, being entitled to tranship, was prevented by the default of the cargo-owners: see *The Bahia* (1864), B. & L. 292. The case cited is distinguishable from such cases as *Hopper v. Burness* (1876), 1 C. P. D. 137, as there the sale was by the master; here the master was in no way responsible for it.

(p) *Liddard v. Lopes* (1809), 10 East, 526.

(q) *Metcalfe v. Britannia Iron Works Co.* (1877), 2 Q. B. D. 423. See also *Castel v. Trechman* (1884), 1 C. & E. 276.

freight for the voyage out and home, payable on final delivery of the cargo, to be £1300. The ship reached Q. and discharged: she then loaded a cargo and proceeded to Z., but on the voyage suffered great damage and put into Y., where the ship and one-third of the cargo were abandoned. The captain left for England, leaving instructions with the vice-consul to forward the remainder of the goods to Z., and they were forwarded. *Held*, that C. was liable to pay freight *pro rata* from Q. to Y.; that he was not liable for freight from X. to Q.; nor could the shipowner claim freight from Y. to Z., as the vice-consul and captain in their combined action had acted as agents of C. and not of the shipowner (r).

Case 6.—A ship on a voyage to Z. was, owing to perils of the sea, abandoned by her crew. She was found derelict by another ship, which brought her into an English port. *Held*, that upon satisfying the cargo's liability to the salvors the cargo owners were entitled to their goods without payment of any freight, the contract of affreightment being at an end by justifiable abandonment of the ship, and the shipowner having therefore no right to carry on by transhipment (s).

Case 7.—A ship, S., on a chartered voyage met with storms, and signals of distress were made to the ship R. The S.'s master and crew went on board the R., but without taking clothes or baggage; on seeking to return to the S. they were not allowed; the master of the R. sent some of his own crew on board the S., and the S.'s crew helped to navigate the R. *Held*, that there was no such abandonment as to put an end to the contract of carriage (as there was either no abandonment or an unjustifiable one); that the shipowners were therefore entitled at least to *pro rata* freight, if the consignees required delivery of the cargo (t).

Case 8.—A vessel, chartered to carry coals from X. to Z., by perils of the sea required repairs at Y.; to effect these the captain justifiably sold part of the cargo at a higher price than he could have obtained in Z. *Held*, that as the cargo owner had not acquiesced in the sale, no claim for *pro rata* freight to Y. could be made against him (u).

(r) *Mitchell v. Darthez* (1836), 2 Bing. N. C. 555.

(s) *The Cito* (1881), 7 P. D. 5, but see and contrast *Case 10, infra*, and note (j) on p. 383; see also *The Kathleen* (1874), L. R. 4 A. & E. 269; *Curling v. Long* (1797), 1 B. & P. 634; *The Arno* (1895), 8 Asp. M. L. C. 5. On rights of underwriters to freight, see *Hickie v. Rodocanachi* (1855), 4 H. & N. 455; *Miller v. Woodfall* (1857), 8 E. & B. 493; *Guthrie v. North China Ins. Co.* (1902), 7 Com. Cases, 130.

(t) *The Leptir* (1855), 52 L. T. 768. *Seemle*, that if the owners were willing to tranship and carry on, the consignees were not entitled to their goods without full freight being paid. In this case the suit was by salvors; the shipowners put in no appearance, and would seem to have abandoned all intention of carrying on, in which case they would have no right to any freight.

(u) *Hopper v. Burness* (1876), 1 C. P. D. 137.

Case 9.—Goods shipped in July, 1914, at an American port on the British steamer *St. H.* under a bill of lading for delivery at Hamburg. During the voyage the war with Germany began on August 4. The consignees, owners of the goods and British subjects, on the ship being diverted to Manchester, took delivery of the goods there. *Held*, that the shipowners had no claim against them for any freight (*v*).

Case 10.—A timber cargo was shipped at Archangel on the *Jupiter* in July, 1916, under a charterparty for carriage to Hull, with an exception of King's enemies, and freight to be paid on delivery. Off the coast of Scotland a German submarine stopped the ship, drove her crew into the boats, and exploded bombs to sink her. The Germans then towed the crew, who thought their vessel was sunk, five miles away, and left them. A few days later the vessel and her cargo, not having been sunk in fact, were brought by salvors into Leith. The charterers at once telegraphed to the owner claiming to have the cargo delivered freight free at Leith, but the owner at once replied repudiating this claim, and claiming to be entitled to complete the voyage. *Held*, that in these circumstances the owner was entitled to complete the voyage, and the contract was not determined by any "abandonment" of the vessel or voyage (*x*).

Note.—*Hopper v. Burness* (*u*) reconciles the cases of *Baillie v. Moudigliani* (*y*) and *Hunter v. Prinsep* (*z*), shewing that mere receipt of the produce of the sale of goods at an intermediate port by their owner cannot be treated as the receipt of the goods themselves, so as to give rise to a claim for freight *pro rata*. Brett, J., puts the cargo owner's position thus:—

(1.) If the goods are sold for a higher price, at the intermediate port, than they would fetch at the port of destination, he can treat the proceeds as a forced loan, and claim them at once without paying *pro rata* freight.

(2.) If they are sold for a smaller price, he can similarly

(*v*) *St. Enoch Co. v. Phosphate Co.*, (1916) 2 K. B. 624. Cf. *East Asiatic Co. v. Tronto S.S. Co.* (1915), 31 T. L. R. 543. In the Prize Court a different principle applies; cf. *The Juno*, (1916) P. 169. The plaintiffs in the above Case 9 attempted in the Prize Court to secure a practical reversal of the judgment in the *K. B. D.* but failed in the P. C. See *The St. Helena*, (1916) 2 A. C. 625.

(*x*) *Bradley v. Newsum* (H. L.), (1919) A. C. 16. Some people would have thought this voyage abandoned, as did Lord Sumner, but wrongly according to the majority in the House of Lords.—(T. E. S.) For a reference to *Ex parte Cheeseman* (1763) 2 Eden 181, as a case which curiously anticipates this one, we are indebted to the learning and courtesy of Mr. Gerald Fitzgibbon, K.C., of Dublin.

(*y*) (1775), *Park on Insurance*, p. 90.

(*z*) *Hunter v. Prinsep* (1808), 10 East, 378.

treat the actual proceeds as a forced loan (a), but he can also claim an indemnity for the difference of the price, if, but not unless, the ship arrives at the port of destination (b), and he must then deduct the freight that would have been due on the delivery of the goods there if carried.

Article 144.—Amount of Freight (c).

Freight is payable according to the express stipulations of the charter or bill of lading (d), or, failing them, according to the custom of the trade or port (e). If no rate of freight is expressly agreed, the shipowner will be entitled to a reasonable sum (f).

Similarly, if a charter is for the carriage of specified goods at a named freight, but the charterer ships goods of a different description, the shipowner can claim that as to the latter there is no agreed rate of freight, and the charterer must pay the market rate as a reasonable remuneration for services rendered outside the contract (g).

Thus, if the goods shipped belong to the shipowner, and therefore no freight is due from him for their carriage, but a freight, whether 'substantial (h) or

(a) This has been doubted by Pollock, C.B., in *Atkinson v. Stephens* (1852), 7 Ex. 567.

(b) *Atkinson v. Stephens*, *vide supra*.

(c) By an Act, 14 Rich. II. c. 6, owners of ships were only to take "Reasonable Gains for the Freight of the same" (Ruffhead). And by an Act, 32 Hen. VIII. c. 14, rates of freight were fixed from London to various places, with a proviso that "in case of War the Freight may be raised."

(d) There may be an express agreement for the payment of freight outside that in the bill of lading: *Hedley v. Lapage* (1816), Holt, 392.

(e) See Article 8; and *cf. Young v. Jarrah Co.* (1899), 4 Com. Cases, 96.

(f) *Cf. Ursula Bright Co. v. Ripley* (1903), 8 Com. Cas. 171; and *cf. Sale of Goods Act*, 1893, s. 8 (2).

(g) *Steven v. Bromley*, (1919) 2 K. B. 722; and see pp. 147, 150. The principle is that where A. having contracted with B. does work outside that which he has undertaken, and B. accepts the benefit of that, an agreement by B. to pay reasonably for the work may be implied. See *Rederi Sverre v. Phs. Van Ommeren* (1921), 6 Ll. L. R. 193.

(h) *Weguelin v. Cellier* (1873), L. R. 6 H. L. 286.

nominal (*i*), is inserted in the bill of lading as payable, that freight will be payable by assignees of the bill of lading or persons taking delivery under it, other than the owner or his agents.

Interest is not payable, unless by special agreement, on freight, and cannot be recovered in an action for freight (*k*).

Case 1.—E., master of a ship owned by A., carried a cargo of wheat "on owner's account," purchased on the credit of R., to whom E. gave bills of lading for "wheat shipped on owner's account, deliverable to P.'s order at freight of 1s. per ton," and bills of exchange for the price, which A. accepted. A. had mortgaged his ship to M. A. sold the cargo *in transitu* to K., the sale note running "as cargo is coming on ship's account, freight to be computed at £2 15s. per ton." A. indorsed the bill of lading, which he had received from P. on his acceptance of the bills of exchange to K., with a note: "The freight assigned is at the rate of £2 15s. per ton, and not the nominal amount of 1s. per ton." On ship's arrival, M., as mortgagee, took possession, and claimed freight at £2 15s. from K., who refused to pay more than 1s. *Held*, that M. was only entitled to the freight named in the bill of lading, the larger sum being in reality part of the purchase-money, and no claim of *quantum meruit* being possible in face of the express contract (*l*).

Case 2.—D., as agent for C., purchased and paid for rice to be carried to Z. in C.'s ship. The rice was then shipped under bills of lading, "to be delivered to D. or assigns, freight for the said goods at £4 5s. per ton." C. assigned the freight to M. during the voyage. *Held*, that on arrival D. was bound to pay to M. the freight in the bill of lading, and was not entitled to set off the price of the rice due from C. to himself (*m*).

Where freight is payable on goods according to their weight or measurement, and owing to swelling (*n*),

(*i*) *Keith v. Burrows* (1877), 2 App. C. 636; *Brown v. North* (1852), 8 Ex. 1; *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543. The shipowner may, however, have a lien as unpaid vendor for the balance of the price, representing what would be freight if the shipowner and original goods-owner were different? *Swan v. Barber* (1879), 5 Ex. D. 130.

(*k*) *Merchant Shipping Co. v. Armitage* (1873), L. R. 9 Q. B. 114. For an example of an express agreement for interest, see *E. Clemens Horst Co. v. Norfolk, &c. Co.* (1906), 11 Com. Cas. 141. As to interest on a deposit for freight under the Merchant Shipping Act, s. 495, see *Red "R." S.S. Co. v. Allatini* (1908), 14 Com. Cas. 82, at p. 92.

(*l*) *Keith v. Burrows* (1877), 2 App. C. 636.

(*m*) *Wequelin v. Cellier* (1873), L. R. 6 H. L. 286.

(*n*) *Gibson v. Sturge* (1855), 10 Ex. 622; *Spaight v. Farnworth* (1880), 5 Q. B. D. 115, *per* Bowen, L.J., at p. 118. *Malynes, Lex Mercatoria*

expansion after hydraulic pressure (*o*), or shrinkage, the same goods are larger or smaller at the port of destination than when loaded, freight will be payable in the absence of express stipulation or usage on the amount shipped, and not on the amount delivered (*p*).

Case 1.—A ship was chartered to load a full and complete cargo and deliver on being paid freight at £2 7s. 6d. per ton. The bill of lading shewed 2664 quarters shipped; owing to heat the corn swelled, and 2785 quarters were delivered. *Held*, that freight was payable on the quantity shipped, and not on its measurement at the port of discharge (*q*).

Case 2.—Charter to load and deliver a full cargo of cotton on being paid freight at the rate of "£3 15s. per ton of 50 cubic feet delivered" on right delivery of cargo. The cotton was hydraulically pressed before shipment, and consequently expanded on delivery. *Held*, apart from a custom to pay by the measurement of the port of loading, that freight was payable on the quantity delivered as loaded, and not on the measurement after discharge (*r*).

(1686), p. 100, may be taken to indicate the same principle,—“If a woman be carried over and be delivered of a child on the voyage, yet there is nothing to be paid for the passage of the child.”

(*o*) *Buckle v. Knoop* (1867), L. R. 2 Ex. 333.

(*p*) *Dakin v. Oxley* (1864), 15 C. B. N. S. 646, *per* Willes, J., pp. 665, 666. On the terms “gross invoice weight, gross landing weight,” see *Leech v. Glynn* (1890), 6 T. L. R. 306.

(*q*) *Gibson v. Sturge*, *vide supra*. To meet this, the clause “freight payable according to net weight delivered,” was sometimes introduced into shipping documents; and in *Coulthurst v. Sweet* (1866), L. R. 1 C. P. 649, under a bill of lading with that clause, the shipowner was *held* not entitled to demand freight on the weight named in the bill of lading, or to require the consignee to pay the expense of weighing. Willes, J., said, “In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing.” See also *Marwood v. Taylor* (1901), 6 Com. Cases, 178. In *Spaight v. Farnworth*, *vide supra*, the words were “freight payable on timber on intake measure of quantity delivered.” This was held to mean on the quantity delivered taken at the actual measures of the port of shipment. In *London Transport Co. v. Trechman*, (1904) 1 K. B. 635, under the words “deliver the cargo . . . on being paid freight at the rate of 10s. 6d. per ton gross weight shipped payable on delivery of the cargo,” it was *held* that freight was only payable on the cargo delivered, not on the amount of cargo shipped, but upon the shipping weight of the cargo so delivered. A more complicated clause is found in *Tully v. Terry* (1873), L. R. 8 C. P. 679. See also *Oostzee Stoomvaart Maats. v. Bell* (1906), 11 Com. Cas. 214; and *New Line, Ltd. v. Bryson* (1910), Sess. Cas. 409 (freight “per intaken Gothenburg standard,” and cargo in fact never measured on shipment).

(*r*) *Buckle v. Knoop*, *supra*.

Case 3.—Clause in a bill of lading, "Freight . . . to be paid . . . on the gross weight at the port of discharge . . . it being expressly agreed that freight is to be considered as earned and must be paid ship and/or cargo lost or not lost." Part of the goods (nitrate) was dissolved by sea water on the voyage. But for this the cargo on delivery would have weighed 93 tons more than the cargo actually delivered did weigh. *Held*, that freight was payable on this 93 tons (s).

So, where freight is payable according to quantity or measurement, the method of weighing or measuring, in the absence of express indication or custom to the contrary (t), must be determined by the custom of the port of loading (u).

Where freight is payable on a basis of measurement at the port of loading, it is the charterer's duty to have it so measured, and if that be neglected the shipowner can recover as damages the cost of so measuring it at the port of discharge (x).

Case 1.—A ship was chartered to carry a cargo of not less than 1000 tons weight and measurement. *Held*, that the proportions of weight and measurement goods were to be determined by the custom of the port of loading, and not of the port of discharge (y).

Case 2.—A ship was chartered, "freight at the rate of 35s. per 180 English cubic feet taken on board, as per Gothenburg custom." The cargo was not measured at the Baltic port of shipment; but on arrival at Hull, was there measured for the payment of freight. *Held*, that it should be measured according to the G. custom, and not the custom of the port of discharge (z).

(s) *Pacific Steam Co. v. Thomson* (1920), Sess. Cas. (H. L.) 159.

(t) *Nielsen v. Neame* (1884), 1 C. & E. 288, where freight was to be paid "45s. per St. Petersburg standard hundred," and the method of calculating St. P. standard hundreds used at the port of discharge was taken, on evidence of a custom to that effect. See also *Bottomley v. Forbes* (1888), 5 Bing. N. C. 121.

(u) *Pust v. Dowie* (1865), 34 L. J. Q. B. 127; *The Skandinav* (1881), 51 L. J. Ad. 93 (C. A.).

(x) *Merryweather v. Pearson*, (1914) 3 K. B. 587.

(y) *Pust v. Dowie*, *vide supra*, and see Article 46, note (n), p. 155.

(z) *The Skandinav*, *vide supra*. The two cases of *Moller v. Living* (1811), 4 Taunt. 101, and *Geraldes v. Donison* (1816), Holt, N. P. 346, are not inconsistent with this. In *Moller v. Living* there was a contract to pay freight at £14 per last on a quantity stated in the bill of lading as 100 lasts in 2092 bags." The voyage was from D. to L. There were 2092 bags on board, and they contained 100 lasts by L. measure but not by D. measure: *held*, that the specific description in the bill of lading negatived any question of different measures, and freight was

Case 3.—A charterparty for a cargo of pit props provided that freight should be payable "per intaken piled fathom of 216 cubic

payable on the 100 lasts. If the description had been simply "100 lasts," the question would arise, and it did in *Geraldes v. Donison*, *vide supra*, where following a usage of merchants, it was held that the bill of lading weight was subject to check by weighing at the port of delivery; the Court there suggesting that the clause "weights unknown" in the bill of lading introduced the custom. But in *Tully v. Terry* (1873), L. R. 8 C. P. 679, that clause was held not to interfere with the captain's right under the charter to be paid freight on the invoice quantity in the bill of lading; the object of the clause being explained to be "to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery, or deterioration, not caused by his default." *Vide supra*, Article 52.

For freight on fodder, under a special cattle contract, see *Holland v. Pritchard* (1896), 12 Times L. R. 480; and *British South American Co. v. Anglo-Argentine Co.* (1902), 18 Times L. R. 382, in which case a charter for carriage freight free of fodder "necessary for the voyage" was held to mean "necessary in fact as found at the port of discharge," not necessary according to the estimate formed on shipment.

Under some charters, freight may be paid at receiver's option on quantity delivered or on bill of lading quantity, less 2 per cent. Such an option need not be exercised by the consignee till the time for payment arrives: *The Dowlais* (1902), 18 Times L. R. 683; but may be exercised by the receiver when he is required to pay advance freight: *English Coaling Co. v. Tatem* (1919), 63 S. J. 336. The Chamber of Shipping Coal Charter, 1896, gives such an option—"to be declared in writing before bulk is broken." An attempt to prove a customary right to such an option, without express provision in the bill of lading, failed in *Gulf Line v. Laycock* (1901), 7 Com. Cases, 1. In such a case, the charge for stevedoring will be on the quantity on which freight is payable: *The Hollinside*, (1898) P. 131. *Quære* as to the right of the shipowner against the charterer, if with such a clause in the charter, he presents bills of lading for signature which understate the quantity shipped, and the shipowner, on receivers exercising their option to pay freight on bill of lading quantity less 2 per cent., loses freight he ought to have earned?

In *Dillon v. Livingston and P. & O. Co.* (1895), 11 Times L. R. 313, an agreement by the master that if the consignee dispensed with weighing he would accept freight on bill of lading quantity, less 2 per cent., and pay for 2 per cent. cargo short delivered, was held within his authority as master.

For special clauses as to freight, where the cargo is to consist of several articles at various rates, see—

Capper v. Forster (1837), 3 Bing. N. C. 938.

Cockburn v. Alexander (1848), 6 C. B. 791.

Warren v. Peabody (1849), 8 C. B. 800.

Southampton Co. v. Clarke (1870), L. R. 6 Ex. 53.

For special phrases, *e.g.* :—

Freight in full for the voyage, see *Sweeting v. Darthez* (1854), 14 C. B. 538.

Highest freight paid on same voyage: *Gether v. Capper* (1856), 18 C. B. 866.

Alternative freights: *Gibbens v. Buisson* (1834), 1 Bing. N. C. 283; *Fenwick v. Boyd* (1846), 15 M. & W. 632.

feet." The charterers did not have it measured on that basis at the loading port. The shipowner had it so measured at the port of discharge. *Held*, that the shipowner could recover the cost of this measurement from the charterers (a).

Article 145.—Freight when payable.*

When freight is payable on delivery of the cargo, payment and delivery are concurrent acts (b). The merchant is not entitled to have the goods, unless he is ready to pay the freight. The shipowner is not entitled to the freight, unless he is ready to deliver the cargo (c). The master is entitled to refuse to discharge the cargo, unless freight is paid for each portion as delivered (d); *semble*, also that the merchant need only pay freight *pari passu* with delivery.

Note.—Freight is usually payable at the financial centre; the stipulations as to the time of its payment vary considerably in practice, but in very many cases freight is payable at the port of loading, sometimes on delivery of bills of lading, sometimes with fourteen days' credit. In the former case, where the bill of lading contains a clause "freight paid in London," the delivery of the bill of lading acts as a receipt for the freight.

(a) *Merryweather v. Pearson*, *vide supra*.

(b) *Vogeman v. Bisley* (1897), 2 Com. Cases, 81. It may be that the consignee is entitled to ascertain what goods are on board before payment.

(c) *Paynter v. James* (1867), L. R. 2 P. C. 349; *Yates v. Railston*; *Tate v. Meek*; *Yates v. Mennell* (1818), 2 Moore, C. P. 278, 297; *Duthie v. Hilton* (1868), L. R. 4 C. P. 138.

(d) *Black v. Rose* (1864), 2 Moore, P. C. N. S. 277; *Brown v. Tanner* (1868), L. R. 3 Ch. 597, which decides that the freight under a charter is not due under the contract till all the cargo is delivered, and which turns partly on the special words "freight to be collected by the charterers," would not prevent the master from claiming his lien on each part of the cargo. In *Suart v. Bigland* (C. A.), January 24, 1886, a clause "to pay out of freight collected," was held to mean "out of gross freight collected," and not to justify postponement of payment

Article 146.—Time Freight in Charters.

Where freight is payable by time it is earned at the end of each period specified, unless a contrary intention appears (*e*), although it may only be payable under the charter at longer intervals, and the ship be lost before the longer interval expires (*f*).

In the absence of express agreement it is payable during the ship's detention by blockade (*g*), embargo (*g*), bad weather (*g*), or repairs (*f*), unless the delay involved is so great as to put an end to the whole contract (*h*).

An exception of "strikes," expressed to be mutual, will not absolve the charterer from paying hire for time during which by reason of a strike he is unable to use the ship (*i*).

Note.—Time charters now usually contain clauses as follows:—"In the event of loss of time from deficiency of men or stores, break-down of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease till she be again in an efficient state to resume her service (*k*). . . . Should the vessel be lost without being heard of, hire shall cease to be due fifteen days after she left her last port" (*l*). A vessel with this clause broke down in her high-pressure engine on a voyage from the West Coast of Africa to the Elbe, and put into the Canary Islands, where she was pronounced unfit to proceed. A tug was engaged as a general average expenditure, and brought her home with the use of her low-pressure engine. *Held*, that no freight was payable from the Canary Islands to the Elbe, as the ship was not in an efficient state; but that hire was due for the time during which she was discharging cargo at the port on the Elbe (*m*),

(*e*) As it did in *Gibbon v. Mendez* (1818), 2 B. & Ald. 17.

(*f*) *Havelock v. Geddes* (1809), 10 East, 555.

(*g*) *Moorsoom v. Greaves* (1811), 2 Camp. 626. See also for a case of detention by other Government orders, *Radcliffe v. Compagnie Generale* (1918), 24 Com. Cas. 40.

(*h*) See Article 30, and the Note at its end.

(*i*) *Brown v. Turner Brightman*, (1912) A. C. 12.

(*k*) See *Smailes v. Evans* (1917), 33 T. L. R. 233.

(*l*) For a special clause of this kind providing for time lost by "grounding in shallow harbours, rivers, or ports," see *Magnild v. McIntyre* (1921), 26 Com. Cas. 185.

(*m*) *Hogarth v. Miller*, (1891) App. C. 48.

as she was efficient for that purpose, though not for proceeding to sea as a steamer (n).

Under the above clause, if damage prevents the working for more than twenty-four hours, hire ceases from the beginning of the period, and not from the end of the twenty-four hours (o). And hire ceases as soon as time begins to be lost by a stipulated cause (p). Hire begins again, not when the ship is in the same position as when she broke down, but when she has been repaired, and is again efficient to resume her service, and may thus be paid for the time in which, having been repaired, she is proceeding to reload cargo discharged to enable her to repair (q). The charterer may therefore have to pay twice for part of the voyage (r).

The ordinary clause does not provide for payment of *pro rata* hire for a ship partly efficient, as when a steamer, broken down, completes her voyage under sail, nor for the return of prepaid hire, in respect of that portion of time already paid for, during which the ship remains inefficient; it is advisable to modify the clause to meet these points.

Except as specially provided by such a clause, hire continues to be payable throughout the chartered period. The charterer cannot rely on an excepted peril as excusing him from paying hire during time in which by such excepted peril he is unable to use the ship (s).

(n) See also *Burrell v. Green*, (1914) 1 K. B. 293; (1915) 1 K. B. 391.

(o) *Meade King v. Jacobs*, (1915) 2 K. B. 640. Sometimes the clause is worded expressly so as to exclude the allowance for the first twenty-four hours. See clause 14 of the charterparty in *Vogemann v. Zanzibar Co.* (1902), 7 Com. Cas. 254.

(p) In the Scotch case, *Giertsen v. Turnbull* (1908), Sess. Cas. 1101, it was held that hire ceased by reason of "break-down of machinery" from the point of time at which the defects in machinery became so serious as to make it reasonably necessary to put into a port for repairs. In the same case it was held that, as by the charter the charterers were to pay for all coals, they could not claim to recover from the shipowner the cost of coals consumed during the time for which hire ceased during the break-down or inefficiency.

(q) *Smailes v. Evans*, (1917) 2 K. B. 54.

(r) *Vogemann v. Zanzibar Co.* (1902), 7 Com. Cases, 254. In *In re an Arbitration between Traae and Lennard*, (1904) 2 K. B. 377, where the clause was "detention by ice to be for the account of the charterers, unless caused by break-down of steamer," the steamer was damaged by stranding, and her repairs detained her so long that she could not get to St. Petersburg before the winter ice set in, and waited at Riga. The arbitrators gave her freight from her port of repair to Riga, but refused it while waiting at Riga till St. Petersburg opened in the spring.

(s) *Brown v. Turner Brightman*, (1912) A. C. 12; *Aktieselskabet Lina v. Turnbull* (1907), Sess. Cas. 507. So *Modern Co. v. Duneris S.S. Co.*,

Whether a "month" in charters is lunar or calendar must depend upon the usage of the trade or port, in the absence of express stipulation, which is usually that the month shall mean thirty days and is generally inserted. Thus, in 1863, in *Turner v. Barlow* (t), Erle, C.J., held that "month" = lunar month, except in mercantile transactions in the City of London, when it meant calendar month: and in *Jolly v. Young* (u), it was held that month = calendar month. Under a clause to pay freight per month, and at the same rate for any part of a month, Denman, J., following *Commercial S.S. Co. v. Boulton* (x), held that a part of a day must be reckoned as a whole day (y). Some few charters contain a guarantee by the shipowner that the passage shall not exceed a certain time.

On the position where a ship is chartered for a fixed time, and the charterers send her on a voyage which cannot be completed in that time, see *Gray v. Christie* (z), where Mathew, J., decided that if the voyage was a reasonable one (a), freight must be paid at chartered, not at current rates. The possible extension of the chartered period is now provided for by a clause such as:—"Should the vessel be upon a voyage at the expiration of the within-named period, the charterers are to have the use of the steamer at the same rate and conditions for such extended time as may be necessary for the completion of their contemplated voyage, and in order to bring steamer to a port of re-delivery (b) as provided." Where, under that clause, the charter was for

(t) 3 F. & F. 949.

(u) (1794), 1 Esp. 187.

(x) (1875), L. R. 10 Q. B. 346.

(y) *Angier v. Stewart* (1884), 1 C. & E. 357.

(z) (1889), 5 Times L. R. 577.

(a) See also *Watson v. Merryweather* (1913), 18 Com. Cas. 294; and *Meyer v. Sanderson* (1916), 32 T. L. R. 428.

(b) "Delivery" and "re-delivery" in modern time charters survive from the old times of charters by demise. The words now mean only the times at which the shipowner begins and ends rendering services to the charterer by his vessel and his servants upon her. Cf. *Italian State Railways v. Mavrogordatos* (1919), 2 K. B. 305. The mental confusion implicit in "delivery" and "re-delivery" sometimes results in the presence of a clause, "Charterers shall have a lien on the vessel for all moneys paid in advance and not earned." It is difficult to see how a charterer can exercise a lien upon a ship, on board of which he would be a trespasser. A good deal of the discussion as to the right of the Crown to "requisition" ships in recent years has not noticed the fact that the so-called "requisition" during the war was usually a demand upon the shipowner that he should render services by his servants under an ordinary time charter (called T. 99) and involved no taking of possession by the Crown.

"about six months," and charterers had an option of re-delivery (b) in a U. S. or in a British port, and at the expiration of six months the ship was in a U. S. port, it was held that the charterers could not claim to send the ship under the charter to a British port (c). But where the named period has not expired, the charterers under such a clause can send her on a voyage which must obviously exceed the chartered period, and are not limited to sending her on such a voyage as is likely to occupy only the balance of the named period (d). A variant^f clause, to meet this point, which is sometimes used, is "Should the steamer be on a voyage at the expiration of the period fixed by this charter, the charterers are to have the use of the steamer at the rate and on the conditions herein stipulated to enable them to complete the voyage, provided always that the said voyage was reasonably calculated to be completed about the time fixed for the termination of the charter." This seems to provide expressly for that result which, in the absence of any clause at all, was held to be implied in *Gray v. Christie* (z).

Under a time charter "for the term of six calendar months," with the clause, "Charterers to pay hire at the rate of £275 per calendar month, or any part of a month, payment (to be) half-monthly in advance except for the last half-month, which time is to be estimated and paid in advance, up to such time as the steamer is expected to be re-delivered" (b), it was held that the hiring was for six months certain, and therefore the charterers could not re-deliver the steamer in the last half-month and claim an abatement of prepaid hire for the period from such delivery until the expiration of the six months (e).

Under a time charter for six or seven (in charterers' option) consecutive voyages during 1910, when the steamer did not finish the sixth voyage until January 6, 1911, it was held that the charterers could not exercise their option to send her on a seventh voyage in 1911 (f).

Under the ordinary clause:—"Freight so much per calendar month and at the same rate for any part of a month, hire to continue till re-delivery to owners; payment

(c) *Bucknall v. Murray* (1900), 5 Com. Cases, 312; cf. *In re The Istok and Drughorn* (1902), 7 Com. Cases, 190, where with a similar clause, the ship was not at a port of re-delivery, but the charterers proposed to send her, not to such a port, but on a fresh voyage first, and it was held that the owners could claim re-delivery where she was.

(d) *Dene S.S. Co. v. Bucknall* (1900), 5 Com. Cases, 372.

(e) *Reindeer S.S. Co. v. Forslind* (1908), 13 Com. Cas. 214.

of the said hire to be made in cash in London monthly in advance without deduction":—the charterer is liable to pay the month's hire in advance, though the vessel will probably be re-delivered before the end of the month, recovering the balance overpaid when the date of delivery is ascertained (g).

Another usual clause in such charters is:—"Payment to be made in cash monthly in advance, and failing such punctual and regular payment, the owners shall be at liberty to withdraw the vessel from the service of the charterers" (h).

If under this clause the shipowner does withdraw the vessel, he cannot claim any time hire after the date of his withdrawal (i). But he can claim damages for the charterer's repudiation of the charter for the remainder of the agreed period of hiring (k). If there is cargo on board at the time of his withdrawal, and he carries it to its destination, no doubt he is entitled to remuneration for that service. The exact nature of this right has not yet been discussed by the Courts.

Where a time charter provides that hire shall be paid monthly in advance, and also provides that the shipowner shall have a lien for hire due upon all cargoes and sub-freights, the lien does not come into operation until a payment for hire is due (l). And if, under a provision that the shipowner may on non-payment of hire withdraw the steamer from the service, the shipowner withdraws her in the course of a monthly period, he can only claim freight for

(g) *Tonnellier v. Smith* (1897), 2 Com. Cases, 258 (C. A.); cf. *Stewart v. Van Ommeren*, (1918), 2 K. B. 560. See also *French Marine v. Compagnie Napolitaine*, (1921) 27 Com. Cas. 69.

(h) See as to this, *Re Tyrer & Hessler* (1902), 7 Com. Cases, 166, which decides that the owners need not make a demand for payment before exercising their right of withdrawal. "Punctual and regular" payment means payment on the actual day it is due: *Italian State Railways v. Bitzas* (Lloyd's List, February 16, 1917), in which Sankey, J., disapproved the dictum of Bigham, J., in *Nova Scotia Co. v. Sutherland* (1899), 5 Com. Cas. 106, that payment a day or two late may constitute "punctual payment." See also *MacLaine v. Gatty*, (1921) 1 A. C. 376. The shipowner may by agreement, or by conduct, waive the right to withdraw. See *Nova Scotia, &c. Co. v. Sutherland, &c. Co.* (1899), 5 Com. Cases, 106; *Langford S.S. Co. v. Canadian Forwarding Co.* (1907), 96 L. T. 559; *Modern Co. v. Dunerick S.S. Co.*, (1917) 1 K. B. 370; and *Wulfsberg v. Weardale Co.* (1916), 85 L. J. K. B. 1717.

(i) *Italian State Railways v. Mavrogordatos* (1919), 2 K. B. 305.

(k) *Leslie Shipping Co. v. Welstead*, (1921) 3 K. B. 420. But see *Rutherford Sender & Co. v. Goldthorpe*, (1922) 1 K. B. 508.

(l) *Wehner v. Dene*, (1905) 2 K. B. 92.

the portion of the month completed at the time of his withdrawal, not for the whole month (*l*).

Where, as is common, the charter provides that the charterers shall re-deliver the vessel "in the same good order and condition (fair wear and tear excepted" and also that "hire shall continue until her re-delivery as herein stipulated," if on "re-delivery" the vessel has by the charterer's breach of contract been damaged more than by "fair wear and tear," his liability is for damages (*i.e.* cost of repair and loss of profit while that is done), but he is not liable for hire until the repair is finished (*m*).

A clause is not uncommon to the effect,—“In the event of (*e.g.* war) charterers to have the option of cancelling or suspending the charter.” *Query*, if “suspension” means merely cutting the period during which the cause operates out of the agreed period of hire, or further postponing the agreed termination of the hiring by the addition of the suspended period? Probably the former.

Another common clause is “All derelicts and salvages for owners’ and charterers’ equal benefit” (*n*).

Article 147.—Freight: to whom payable.

To whom freight is payable depends on the terms of the contract of affreightment, or, if no person is named therein, on the person with whom the contract was made, to whom or to his agent freight is payable, subject to any subsequent dealings, such as assignment of the freight or mortgage of the ship.

It may be payable to:—

1. The shipowner (see p. 399).
2. The master (see p. 399).
3. The broker (see p. 400).
4. A third person (see p. 400).
5. The charterer (see p. 401).
6. An assignee of the freight (see p. 404).
7. A mortgagee of the ship (see p. 405).

Note.—Freight payable in London is usually payable to the loading broker of the ship or line; abroad, where the vessel is one of the line, to its branch house or its agents; in other cases, if no instructions are contained in the charter or bills of lading, to the captain or the agent he appoints. In France all freight is frequently payable to the general consignee of a ship, who is quite distinct from the broker.

I. The Shipowner.

Where freight is due from the charterer under a charter, or from the shipper, under a bill of lading where there is no charter, the shipowner, in the absence of express stipulation, is *primâ facie* entitled to receive the freight (*o*). He may give authority to collect such freight to any person he pleases (*p*).

The loading broker (where freight is payable at the port of loading) and the master, when freight is payable on delivery, have ordinarily authority from the shipowner to collect freight (*p*), and payment to either of them will be good payment, discharging the shipper or consignee, unless the owner has given the shipper or consignee notice not to pay either of them (*q*), or unless there is any custom of the trade or port to the contrary. Payment to the master before freight is due will be treated rather as an advance to the master than as payment of freight (*r*).

II. The Master.

The master may be entitled to sue in person for freight:

- (1.) Where the express contract was made with him (*s*):

(*o*) *Smith v. Plumer* (1818), 1 B. & A. 575, at p. 581; *Atkinson v. Cotesworth* (1825), 3 B. & C. at p. 649.

(*p*) *The Edmond* (1860), Lush. 57. For a curious case where the shipper was held to have made a new contract with the shipowner to the exclusion of the charterer, see *Hoyland v. Graham* (1896), 1 Com. Cases, 274.

(*q*) *Atkinson v. Cotesworth*, *vide supra*.

(*r*) *Smith v. Plumer*, *vide supra*.

(*s*) As in *Seeger v. Duthie* (1860), 8 C. B. N. S. at p. 56; *Shields v. Davis* (1815), 6 Taunt. 65.

- (2.) Where a contract to pay freight to him is inferred as a fact from the consignee or some other person taking delivery of the goods (*t*).

The master, however, cannot sue for freight, nor be sued for failure to carry safely, where² he has signed the bill of lading only as agent for the shipowner (*u*).

But the master who receives freight from consignees has usually no right to retain it against his owner, for in the absence of express agreement or statutory procedure (*x*), the master has no lien for wages, or advances made abroad on ship's account, on either ship or freight (*y*).

III. The Broker.

The broker, who has acted as loading broker to the ship (*z*), usually collects the freight he has engaged. Payment to him in the absence of any express notice not to do so will usually discharge the person paying.

IV. A Third Person.

1. Where freight is made payable by the charter or bill of lading to a third person he can only sue in the

(*t*) *Brouncker v. Scott* (1811), 4 Taunt. 1. The master cannot in such a case sue for demurrage, *S. C.* As to the effect of taking delivery, *vide post*, Article 149.

(*u*) *Repetto v. Millar's Co.* (1901), 6 Com. Cases, 129, where the bill of lading incorporated the charter, and the charter required the master to sign bills of lading as presented at any rate of freight without prejudice to the charter.

(*x*) Under sect. 167 of the Merchant Shipping Act, 1894. As to the seamen's lien for wages on freight due under a charter and sub-charter, see *The Andalina* (1886), 12 P. D. 1.

(*y*) *Smith v. Plumer* (1818), 1 B. & A. 575. So also, if freight is made payable to agent of ship's husband, he cannot retain it as against owners in satisfaction of a debt due to him by ship's husband: *Walshe v. Provan* (1853), 8 Ex. 843. Where a master sues for freight on a charter a debt due to the charterer from the shipowner cannot be set off against the master's claim: *sed quære*, now; *Isberg v. Bowden* (1853), 8 Ex. 852.

(*z*) See Article 16 b., note at p. 46. In *Dunlop v. Murietta* (C. A. Dec. 1886) A. in Glasgow instructed B. in Liverpool to make a charter; B. did so with C., through D. in London. A. ratified the charter signed by D.; A. instructed B. to get the advance freight sent "either directly or through you." B. wrote to D. to collect it. D. obtained it from C. and bolted. *Held*, that C. had not paid A.

name of the shipowner, but payment to the shipowner, apart from such a suit, will not discharge the person paying, unless the third person was only to receive payment as agent for the shipowner (a).

2. Payment to a person entitled to receive the beneficial produce of a contract to pay freight will absolve the payer (b): thus payment of freight to the obligee under a bottomry bond binding ship and freight (c), or payment in to the Court of Admiralty, by the monition of the Court, in a suit *in rem* against ship and freight by an obligee of a bottomry bond (d), is a bar to an action for freight by the shipowner.

V. Charterer.

1. If the charter give possession and control of the ship to the charterer, so that the master is his servant (*i.e.* if the charter amounts to a demise of the ship (e)), the charterer is undisclosed principal in the bill of lading, and can sue for the freight (f). The shipowner is not a party to the bill of lading.

2. Where a ship is under a charter which leaves the possession and control in the owner (g), and goods are shipped by third persons under bills of lading signed by the master (h), the express contract in such bills of lading will be made with the shipowner (i), and the contract is equally made with the shipowner if the bills of lading are issued under a sub-charter (i).

(a) *Kirchner v. Venus* (1859), 12 Moore, P. C. 361, at p. 398.

(b) *Morrison v. Parsons* (1810), 2 Taunt. 407, at p. 415.

(c) *Benson v. Chapman* (1849), 2 H. L. C. 696.

(d) *Place v. Potts* (1855), 5 H. L. C. 383.

(e) See Article 2, *supra*.

(f) See *Marquand v. Banner* (1856), 6 E. & B. 232, as explained and criticised in *Gilkison v. Middleton* (1857), 2 C. B. N. S. 134, and *Wehner v. Dene*, (1905) 2 K. B. 92.

(g) *Baumvöll v. GWhrest*, (1893) A. C. 8, and see Article 18, *ante*.

(h) Or by charterers as authorised agents of the master to sign them: *Tillmans v. Knutsford Co.*, (1908) 1 K. B. 185.

(i) *Wehner v. Dene*, *ubi supra*; *Turner v. Haji Goolam*, (1904) App. Cas. 826; *Limerick S.S. Co. v. Coker* (1916), 33 T. L. R. 103. On the facts in *Michenson v. Begbie* (1829), 6 Bing. 190, the shipowner might have been entitled to recover the full bill of lading freight as agent for

The fact that the master has power to sign bills of lading "without prejudice to the charter," will not render the shipper liable under the charter (*k*), but will only protect the shipowner from any alteration of his contract with, and remedies against, the charterer (*l*), and *vice versa* (*m*).

3. But, whether the charterparty does or does not constitute a demise, a bill of lading for goods shipped may be a contract with the charterers, and not with the shipowner, *e.g.*, if it is issued and signed by the charterers, or by the captain as agent expressly for the charterers (*n*).

4. Where the shipowner has under the charter a lien for freight, and his master waives this lien on demand by the shipper or consignee for the goods, a contract by the shipper or consignee with the shipowner to pay him the freight for which the lien is claimed may be found as a fact (*o*) from such demand and delivery, although the shipper or consignee is aware of the charter (*p*).

Case 1.—A chartered a ship to C. to carry corn at 4s. 6d. per quarter. C. could not provide a cargo, and the master (whether as agent of A. or C. was not clear) agreed with F. to carry corn for him at 6s. per quarter: C. entered into a sub-charter with F. at that rate. On arrival A. delivered corn to F., but F. refused to pay A. more than 4s. 6d., C. having given him notice to pay the remaining 1s. 6d. to him. *Held*, that C. was entitled to the

the sub-charterer, if the latter had not withdrawn any authority to do so. *Cf.* also *Wastwater S.S. Co. v. Neale* (1902), 86 L. T. 266, and *Wagstaff v. Anderson* (1880), 5 C. P. D. 171; and see Article 18; *supra*. *Smidt v. Tiden* (1874), L. R. 9 Q. B. 447, does not conflict with the principle here suggested, but owing to mutual mistake between the shipowner and the shipper they never were *ad idem* and there was no contract in fact between them.

(*k*) *Turner v. Haji Goolam, ubi supra*.

(*l*) *Shand v. Sanderson* (1859), 4 H. & N. 381.

(*m*) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67. See Article 20, p. 77.

(*n*) *Harrison v. Huddersfield Co.* (1903), 19 Times L. R. 386; *cf. Samuel v. West Hartlepool Co.* (1906), 11 Com. Cas. 115; *The Okehampton*, (1913) P. 173. See also *Zwischenbart v. Henderson* (1854), 9 Exch. 722, and *Hermann v. Royal Exchange Co.* (1884), 1 Cab. & E. 413. See also pp. 59, 60, *supra*.

(*o*) It will not be implied as a matter of law: see *Sanders v. Vanzeller* (1843), 4 Q. B. 260. *Cf.* as to demurrage: *S.S. County of Lancaster v. Sharpe* (1889), 24 Q. B. D. 158.

1s. 6d., and that no contract by F. to pay more than 4s. 6d. could be implied from his taking delivery (q).

Case 2.—E., master of a ship, chartered her to C.: “captain to sign bills of lading at more or less freight without prejudice to this agreement, proceed to Z., and there deliver on being paid freight a lump sum of £100.” C. put on board 1350 bags of flour; and F. loaded 500 bags of flour, for which E. signed a bill of lading, “which goods I shall deliver to G. for you, paying me freight according to contract with C.” F. wrote to G. and to C., stating that G. would pay a certain freight to C. On arrival at Z., C. paid £100 to E. G. received the cargo from E. under the bill of lading, but refused to pay freight to C. *Held*, that E. could not sue G., on any contract to pay freight either express or implied (r).

Case 3.—A. chartered a ship to C. to carry cargo on being paid freight at 75s. per ton, captain to sign bills of lading, without prejudice to charter, at any rate of freight required. D., C.’s agent, purchased goods for C., taking the bills of lading, which provided for freight at 20s. per ton in his own name. During transit, C. failed. On arrival, A. claimed against D. chartered freight. *Held*, he was only entitled to bill of lading freight (s).

Case 4.—E. A., master and part owner of a ship, chartered it to C. for a certain voyage for a lump sum of £850, “payment to be made by E. A.’s receiving such freight as C. may have payable abroad as per bills of lading, not exceeding half, balance by bills from C. Master, at C.’s request, to sign bills of lading in the usual customary manner, and at any rate of freight that may be filled up, and made payable in any manner the charterers may choose, without prejudice to this charter.” C. put the ship up as a general ship, and E. A. signed bills of lading, “freight paid here as per margin”; £250 was payable abroad, which E. A. received, and took C.’s acceptance for £600, making up £850. C. failed before the bills became due, and E. A. and C.’s representative each claimed the balance of the freight against the shippers. *Held*, that E. A. was acting as C.’s agent in signing bills of lading, and that C. and not E. A. was therefore entitled to the balance of the freight (t).

(q) *Michenson v. Begbie* (1829), 6 Bing. 190.

(r) *Zwilchenbart v. Henderson* (1854), 23 L. J. Ex. 234.

(s) *Shand v. Sanderson* (1859), 4 H. & N. 381.

(t) *Marquand v. Banner* (1856), 6 E. & B. 332. This case was criticised by Cresswell and Willes, J.J., in *Gilkison v. Middleton* (1857), 2 C. B. N. S. 134, and by Channell, J., *Wehner v. Dene S. S. Co.*, (1905) 2 K. B. 92, at p. 98, and is by them explained to be sustainable only on the ground that the charter amounted to a demise. In *Gilkison v. Middleton* (*ubi supra*), the shipowner claimed against holders of the bills of lading a lien for freight due under the charter, though the master had signed bills of lading at a lower rate under a clause in the charter, requiring him to sign bills of lading at freights required by C. the charterer, without prejudice to the charter. It was held that A. had only a lien for the lower freight, on the ground that

Case 5.—A. entered into a time charter for his ship to C. By the time charter a lien was given on all cargoes for hire due under the charter. C. made a sub-charter to S. for a round voyage, S. having notice of the time charter and its terms. For cargo shipped by S. on this voyage the captain signed and issued to him bills of lading which made freight payable at so much per bag. All the bill of lading freight was prepaid by S. On arrival at the end of the voyage A. claimed to exercise a lien against S. for a balance of time charter hire due by C. under the time charter. *Held*, that S. having paid all the bill of lading freight was entitled to have his goods free of the alleged lien (u).

VI. Assignee of Ship or Freight.

The assignee of a ship or of its freight (x) is entitled to all freight due after the assignment, which the assignor had at the time of assignment the right to transfer (y), from the moment at which he has gone through the forms necessary to complete his title (z).

The assignee of a share in the ship is entitled to his share in the freight under similar circumstances (a).

Underwriters on ship who have accepted abandonment become entitled to all freight earned by the ship subsequent to abandonment (b).

Case.—A., in June, 1854, sold by bills of sale 24-64ths of his ship to B., 40-64ths to Q. B. registered his bill of sale in November. In December, A. assigned the freight to be earned on a voyage then in progress to E., and E. gave notice thereof to C., the charterer. In January, 1855, Q. registered his bill of sale. *Held*, B. was entitled to 24-64ths; E. to 40-64ths of the freight (b).

(u) *Turner v. Haji Goolam*, (1904), App. Cas. 826.

(x) An assignment of freight to be earned is good: *Leslie v. Guthrie* (1835), 1 Bing. N. C. 697; *Lindsay v. Gibbs* (1856), 22 Beav. 522, overruling *Robinson v. Macdonnell* (1816), 5 M. & S. 228.

(y) But if the shipowner subsequently mortgages the ship to a mortgagee who has no notice of the previous assignment, the right of the mortgagee to the freight will prevail over that of the assignee: *Wilson v. Wilson* (1872), L. R. 14 Eq. 82.

(z) See *Lindsay v. Gibbs*, *vide supra*; *Morrison v. Parsons* (1810), 2 Taunt. 407; *Gardner v. Cazenove* (1856), 1 H. & N. 423; *Boyd v. Mangles* (1849), 3 Ex. 387.

(a) *Lindsay v. Gibbs*, *vide supra*.

(b) *Stewart v. Greenock Ins. Co.* (1848), 2 H. L. C. 159.

Note.—If the assignment is in writing and absolute, and not by way of charge (c), the assignee, after giving to the persons liable to pay freight notice of the assignment, can sue in his own name (d). Where these conditions are not complied with, he can still only sue in the name of the assignor, as before the Judicature Acts (e). An assignment, absolute in form, may be looked into to see whether it is in substance by way of charge (f). Notice of the assignment of freight to the person liable to pay it takes it out of the order and disposition of the assignor (g).

VII. Mortgagee of Ship and Freight.

A mortgagee who has not entered into possession of the mortgaged ship has no absolute right to the freight the ship may be earning, and cannot compel its payment to himself by simply giving notice to the person liable to pay it (h).

On taking actual or constructive possession (i) he then becomes entitled to all the freight that the ship is in course of earning, whether under an express contract (k), or, if none exists, under a *quantum meruit* (l). He is not entitled to freight which has become due previously to his taking possession, but is still unpaid at that time (m).

(c) See *Burlinson v. Hall* (1884), 12 Q. B. D. 347; *Tancred v. Delagoa Bay Co.* (1889), 23 Q. B. D. 239.

(d) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.

(e) See *Pothonier v. De Mattos* (1858), E. B. & E. 461; *Wilson v. Gabriel* (1863), 4 B. & S. 243; *Weguelin v. Cellier* (1873), L. R. 8 H. L. 286, as to set-off.

(f) *Gardner v. Cazenove* (1856), 1 H. & N. 423.

(g) *Douglas v. Russell* (1831), 4 Sim. 524.

(h) *Keith v. Burrows* (1877), 2 App. C. 636; *Liverpool Marine Co. v. Wilson* (1872), L. R. 7 Ch. at p. 511; *Gardner v. Cazenove* (1856), 1 H. & N. 423; *Dean v. M'Ghie* (1826), 4 Bing. 45; *Kerswill v. Bishop* (1832), 2 C. & J. 529; *Willis v. Palmer* (1859), 7 C. B. N. S. 340.

(i) As by giving notice to the mortgagor and charterer, the ship being at sea, and actual possession impossible: *Rusden v. Pope* (1868), L. R. 3 Ex. 269; or, where the mortgagor is ship's husband, by his removal by the other part owners and the mortgagee: *Beynon v. Godden* (1878), 3 Ex. D. 263.

(k) But no more, even though the freight in the contract is nominal: *Keith v. Burrows*, *vide supra*.

(l) *Gumm v. Tyrie* (1865), 4 B. & S. 680; 6 B. & S. 299.

(m) *Shillito v. Biggart*, (1903) 1 K. B. 683. See also *Cato v. Irving* (1852), 5 De G. & Sm. 210, at p. 224, and *Keith v. Burrows* (1877), 2

The mortgagee of the ship, when entitled to freight, is not liable to have that right defeated by an assignee of the freight under an assignment previous to the mortgage, provided that the mortgagee took his security without notice of the assignment (n).

Case 1.—E., master of A.'s ship, carried a cargo of wheat "on owner's account," purchased on the credit of P., to whom E. gave bills of lading, for "wheat shipped on owner's account, deliverable to P.'s order at freight of 1s. per ton," and bills of exchange for the price, which A. accepted. A. had mortgaged his ship to M. A. sold the cargo *in transitu* to K., the sale note running: "As cargo is coming on ship's account, freight is to be computed at 55s. per ton." A. indorsed the bills of lading, which he had received from P. on the acceptance of the bills of exchange, to K. with a memo: "The freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton. On the ship's arrival, M., as mortgagee, took possession, and claimed freight at 55s. from K., who refused to pay more than 1s. *Held*, that M. was only entitled to the freight named in the bill of lading, the larger sum being in reality part of the purchase-money, and no claim of *quantum meruit* being possible in face of the express contract (o).

Case 2.—A. mortgaged his ship, charters, and freight, to M., and subsequently chartered her, and mortgaged the freight to N., "the freight to be paid on unloading and right delivery of the cargo." The ship arrived in port, and most of the cargo had been delivered to the consignees, when M. took possession. *Held*, that as no freight was payable under the charter till the whole cargo was delivered, M. was entitled by taking possession to the whole freight under the charter (p).

Case 3.—A. mortgaged his ship to M., and afterwards chartered her to C., the charter providing that C. should make advances not exceeding £150 on account of freight, the balance £450 to be paid on delivery of the cargo. C. advanced abroad £300. On the ship's arrival, M. took possession, and claimed £450 balance of freight from C. C. claimed to deduct £150 for advances. *Held*, that the advance of £150 beyond the £150 warranted by the charter was simply a loan, and not a prepay-

A. C. 636. If, however, on his taking possession there is cargo on board subject to a lien for freight which has accrued, "the mortgagee succeeds to the lien and can enforce it": Melish, L.J., *Keith v. Burrows*, 2 C. P. D. 163, at p. 165. As to priority of mortgages, see *Liverpool Co. v. Wilson* (1872), L. R. 7 Ch. at p. 511; *Brown v. Tanner* (1868), L. R. 3 Ch. 597.

(n) *Wilson v. Wilson* (1872), L. R. 14 Eq. 32.

(o) *Keith v. Burrows*, *vide supra*.

(p) *Brown v. Tanner* (1868), L. R. 3 Ch. 597.

ment of freight, and that therefore C. was not entitled to deduct it from the freight due (g).

Article 148.—*Freight: by whom payable.*

Freight is *prima facie* payable according to the terms of the contract of affreightment, and by the person with whom such contract is made. But a new contract may be presumed as a fact from demand of the goods, and their delivery by the master without insisting on his lien (r).

Freight may be payable by:—

- I. The shipper:
- II. The consignee:
- III. The holder of the bill of lading:
- IV. A vendor who gives notice to stop *in transitu*.

I. The Shipper.

From shipment of goods upon a vessel for a certain voyage a contract by the shipper to pay freight for such goods is implied (s).

From this implied contract the shipper may be freed, either by express contract in the bill of lading, or by delivery by the master of a bill of lading with an indorsement freeing the shipper, whose terms are known to the master when he delivers the goods (t). The shipper does not free himself from such liability by indorsing the bill of lading so as to pass the property,

(g) *Tanner v. Phillips* (1872), 41 L. J. Ch. 125. In *The Salacia* (1862), 32 L. J. Adm. 43, the charter authorised "necessary ordinary expenses"; see Article 137.

(r) *Cock v. Taylor*, (1811), 13 East 399; *Sanders v. Vanzeller* (1843), 4 Q. B. 260, in which the earlier authorities are discussed. Many of these e.g., *Drew v. Bird* (1828), M. & M. 156; *Artaza v. Smallpiece* (1793), 1 Esp. 23 (on which see *Cock v. Taylor, vide supra*), and *Moorsom v. Kymer* (1814), 2 M. & S. 303, must be taken as overruled.

(s) *Domett v. Beckford* (1833), 5 B. & Ad. 521; *G. W. R. v. Bagge* (1885), 15 Q. B. D. 626; *Shepard v. De Bernales* (1811), 13 East, 565; *Christy v. Row* (1808), 1 Taunt. 300.

(t) *Lewis v. M'Kee* (1868), L. R. 4 Ex. 58, a case of consignee: see for the general principles, *Watkins v. Rymill* (1883), 10 Q. B. D. 178.

even to the shipowner (*u*). Nor will the presence of the clause in the bill of lading, "to be delivered to consignee or assigns, he or they paying freight for the same," free the shipper, if the master deliver under such a bill to the consignee without insisting on his lien for freight (*x*), unless the master was offered cash by the consignees, and for his own convenience took a bill of exchange, which was afterwards dishonoured, in which case the shipper will be freed (*y*).

Case.—A. chartered a ship to D. to carry iron at 7s. 3d. per ton; the next day, D., professing to act as A.'s broker, chartered it to C., to carry iron at 8s. per ton; each charter contained clauses making freight payable on signing bill of lading, and giving the owner an absolute lien for freight. Neither A. nor C. knew of the other charter, and D. had no authority to make it as broker for A. C. shipped his iron under bills of lading signed by the master making the goods deliverable to "consignees, he or they paying freight as per charter." The master did not demand freight on signing bills of lading, and he delivered to the consignees without insisting on his lien. C. paid 8s. per ton to D., who became bankrupt. A. sued C. for the freight at 7s. 3d. *Held*, there was neither an express nor an implied contract on which A. could sue C., the parties never having been *ad idem* (*z*).

II. The Consignee.

The consignee named in the bill of lading to whom by the consignment the property in the goods shall pass, is by statute liable to pay freight, on the terms of the contract contained in the bill of lading, and as if it had been made with himself (*a*). If he is the owner of the goods, he is also *primâ facie* liable to pay freight for

(*u*) *Fox v. Nott* (1861), 6 H. & N. 630.

(*x*) *Shepard v. De Bernales* (1811), 13 East, 565. Such clauses are inserted for the benefit of the master, confirming his lien, and not of the shipper.

(*y*) *Marsh v. Pedder* (1815), 4 Camp. 257; *Tapley v. Martens* (1800), 8 T. R. 451; *Strong v. Hart* (1827), 6 B. & C. 160.

(*z*) *Smidt v. Tiden* (1874), L. R. 9 Q. B. 446.

(*a*) Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1. * Appendix III.

them, as being the person with whom the contract of carriage is presumed to be made (*b*).

If the consignee demands goods under a bill of lading, making them deliverable on payment of freight, though no contract is implied in law from such delivery, it will be evidence from which a jury may find a new contract to pay freight (*c*), unless the bill of lading clearly negatives such a contract (*d*). A new contract may also be proved by evidence of previous dealings between the parties (*e*), or of usage of trade (*f*).

Entry of the goods at the custom house is *prima facie* evidence that the person in whose name they are entered is their owner and liable to pay freight for them, but he can rebut this presumption by shewing that his entry was merely as agent (*g*).

III. An Indorsee of the Bill of Lading, or Person taking Delivery under it.

Indorsees of the bill to whom by the indorsement the property in the goods has passed (*h*), and who have not

(*b*) *Coleman v. Lambert* (1839), 5 M. & W. 502; *Dickenson v. Lano* (1860), 2 F. & F. 188. All cases before 1855 freeing the consignee from liability to pay freight must be read in the light of the Bills of Lading Act.

(*c*) *White v. Furness*, (1895) A. C., per Lord Herschell, at pp. 43, 44; *Cock v. Taylor* (1811), 13 East, 399; *Dougal v. Kemble* (1826), 3 Bing. at p. 389; *Amos v. Temperley* (1841), 8 M. & W. 798, at p. 805; *Sanders v. Vanzeller* (1843), 4 Q. B. 206; *Kemp v. Clark* (1848), 12 Q. B. 647.

(*d*) *Amos v. Temperley* (1841), 8 M. & W. 798, in which the bill of lading expressly stated that the defendant was consignee as agent for another; *Howard v. Tucker* (1831), 1 B. & Ad. 712, where the bill of lading contained a statement that the freight had been paid in advance, which, though incorrect, was held inconsistent with a new contract to pay it. See also *Ward v. Felton* (1801), 1 East, 507; *Kennedy v. Gonveia* (1823), 3 D. & R. 503.

(*e*) *Wilson v. Kymer* (1813), 1 M. & S. 157; where it was proved that, when similar goods had been previously delivered to defendant, he had always paid the freight.

(*f*) As in *Dickenson v. Lano* (1860), 2 F. & F. 188, where evidence of a custom of the stone trade that the consignee always, the quarry-owner never, paid the freight, was held admissible.

(*g*) *Ward v. Felton* (1801), 1 East, 507; *Wilson v. Kymer* (1813), 1 M. & S. 157; *Artaza v. Smallpiece* (1793), 1 Esp. 23.

(*h*) *Sewell v. Burdick* (1884), 10 App. C. 74, and Article 75.

freed themselves from liability by such an indorsement as passes the property (*i*); and indorseees to whom the property in the goods has not passed by the indorsement, but who complete their proprietary rights by taking delivery of the goods under their indorsed bill of lading (*h*), are by statute liable to pay freight for the goods according to the bill of lading (*k*).

Other indorseees of the bill of lading who take delivery under it, but who do not acquire proprietary rights by so doing (*l*), are only liable if a new contract to pay freight can be found as a fact from the circumstances attending delivery (*m*), and the terms of the bill of lading (*n*).

IV. Vendor who stops *in transitu*. See Article 71, *supra*, p. 217.

(*i*) *Smurthwaite v. Wilkins* (1862), 11 C. B. N. S. 842.

(*k*) The Bills of Lading Act, 1855, Appendix III. For cases before this Act, see *Crawford v. Tobin* (1842), 9 M. & W. 716; *Dougal v. Kemble* (1826), 3 Bing. 383; *Bell v. Kymer* (1814), 1 Marsh. 146.

(*l*) *Sewell v. Burdick* (1884), 10 App. C. 74, and Article 45.

(*m*) *Sanders v. Vanzeller* (1843), 4 Q. B. 260; *Young v. Moeller* (1855), 5 E. & B. 755; *Kemp v. Clark* (1848), 12 Q. B. 647.

(*n*) See *Howard v. Tucker* (1831), 1 B. & Ad. 712; *Lewis v. M'Kee* (1868), L. R. 4 Ex. 58; *Amos v. Temperley* (1841), 8 M. & W. 798. See, as to persons taking delivery after having deposited freight under the Merchant Shipping Act, 1894, Article 127; and *White v. Furness*, (1895) A. C. 40.

SECTION XI.

LIEN.

Article 149.—Kinds of Lien.

A SHIPOWNER may have a lien on goods carried for charges incurred in carrying them:—

I. At Common Law:

II. By express agreement (a).

By Common Law he has a lien for:—

1. Freight (b);
2. General average contributions (c);
3. Expenses incurred by the shipowner or master in protecting and preserving the goods (d);

These are possessory liens depending on the possession of the goods.

Article 150.—Common Law Lien for Freight.

The Common Law lien for freight, which is a possessory lien, only exists where the agreed time for payment of freight is contemporaneous with the time of delivery of the goods (e).

(a) See Article 157.

(b) See Articles 150-154. On a through bill of lading the lien for freight may by the terms of the document include freight for carriage on the first stage of goods lost on the second stage: *The Hibernian*, (1907) P. 277, C. A.

(c) See Articles 117-120.

(d) See Articles 101, 121, and *Hingston v. Wendt* (1876), 1 Q. B. D. 367, at pp. 372, 373. In that case the plaintiff had given up possession of the goods and so lost his lien, but he recovered on a contract made by the defendant's agent to pay the charges in consideration of the goods being released: *ibid.* at p. 371.

(e) See *per Brett, J.*, in *Allison v. Bristol Marine Insurance Co.* (1876), 1 App. C. at p. 225, explaining *Kirchner v. Venus* (1859), 12 Moore, P. C. 361, at p. 390.

In the absence of express agreement (*f*) there is, therefore, no lien for:—

(1.) Advance freight, or freight payable before the delivery of the goods (*g*).

(2.) Freight agreed to be paid after the delivery of the goods, or not due when the goods are claimed (*h*).

Case 1.—Goods were shipped to be carried to Z. under bills of lading, “freight for the said goods to be paid at L., ship lost or not lost.” The ship was lost, but the goods were saved. The shipowners claimed a lien. *Held*, that there was no such lien without express agreement (*i*).

Case 2.—Goods shipped under a bill of lading, “deliverable to order or assigns on payment of freight, as per charter . . . the freight to be paid on unloading and right delivery of the cargo less advances in cash (*j*), at current rates of exchange . . . half freight to be advanced by freighter’s acceptance at three months on signing bills of lading . . . owner to insure the amount and deposit with freighter the club policy.” The freighter gave his bill at three months for half freight, and the master indorsed on the bill of lading, “received on account of the within freight £300 as per charter.” On arrival, before freighter’s acceptance became due, the captain heard that the freighter was bankrupt, and refused to deliver the cargo, unless the whole freight was paid. *Held*, that there was no lien on the cargo for the £300 advance freight (*k*).

Case 3.—A charter provided for payment of freight at 33s. 6d. per ton, the shipowner to have an absolute lien on the cargo for freight; the captain to sign bills of lading at any rate of freight,

(*f*) See Article 157.

(*g*) *How v. Kirchner* (1857), 11 Moore, P. C. 21; *Kirchner v. Venus* (1859), 12 Moore, P. C. 361; *Ex parte Nyholm, In re Child* (1873), 29 L. T. 634; *Nelson v. Association for Protection of Wrecked Property* (1874), 43 L. J. C. P. 218; *Tamvaco v. Simpson* (1866), L. R. 1 C. P. 363; *Gardner v. Trechmann* (1884), 15 Q. B. D. 154. The case of *Gilkison v. Middleton* (1857), 2 C. B. N. S. 134, adversely criticised in *Kirchner v. Venus*, is distinguishable on the ground that a lien for all freight due under the charter was expressly given by the charter; though, as this was not incorporated in the bill of lading, to make consignees for value liable for it seems contrary to such cases as *Fry v. Mercantile Bank* (1886), L. R. 1 C. P. 689. In *Neish v. Graham* (1857), 8 E. & B. 505, there was no such express lien, and it must be taken as overruled.

(*h*) *Foster v. Colby* (1858), 3 H. & N. 705; *Thompson v. Small* (1845), 1 C. B. 328; *Alsager v. St. Katherine’s Docks* (1845), 14 M. & W. 794; *Lucas v. Nockells* (1828), 4 Bing. 729; the agreement to receive payment subsequently is treated as a waiver of the lien.

(*i*) *Nelson v. Association for Protection of Wrecked Property* (1874), 43 L. J. C. P. 218.

(*j*) *Held* to mean “to be paid in cash, less advances.”

(*k*) *Tamvaco v. Simpson* (1866), L. R. 1 C. P. 363.

but, should the total freight as per bills of lading be under the amount estimated to be earned by the charter, the captain to demand payment of the difference in advance. The captain signed bills of lading under the chartered rate, but did not demand payment of the difference. *Held*, there was no lien for such difference (l). •

Case 4.—C. chartered a ship from A., to proceed to L. at 77s. 6d. per ton freight and hire, £250 to be advanced in cash on signing bills of lading and clearing at the custom house, and remainder on delivery at L. Ship to have an absolute lien for freight, dead freight, and demurrage. After the ship was loaded, and before she sailed, C. failed, and his trustee disclaimed the charter. A. claimed a lien on the cargo for at least the £250. *Held*, that, being advance freight, there was no lien for it by common law or custom, and that the clause in the charter was not enough to give a lien for it as it was not “freight” (m).

Case 5.—C. chartered a ship from A., freight to be paid £1250 at port of loading and £1000 on delivery, the remainder in cash two months from vessel's report inwards, and after right delivery of the cargo. A. to have an absolute lien on the cargo for all freight. *Held*, that A. had no lien under the charter for the freight payable “after delivery of goods” (n).

Article 151.—On what Goods.

The Common Law lien for freight applies to all goods coming to the same consignee on the same voyage for the freight due on all or any part of them (o), but not to goods on different voyages under different contracts (p).

Article 152.—For what Amount (q).

When, the ship being chartered, the consignee is the charterer or his agent, he will be bound by the lien for

(l) *Gardner v. Trechmann* (1884), 35 Q. B. D. 154.

(m) *Ex parte Nyholm, In re Child* (1873), 29 L. T. 634.

(n) *Foster v. Colby* (1858), 3 H. & N. 705.

(o) *Sodergren v. Flight* (1796), cited 6 East, 622; *Perez v. Alsop* (1862), 3 F. & F. 188.

(p) *Bernal v. Pim* (1835), 1 Gale, 17.

(q) See Article 144, *Amount of freight*.

freight due under the charter (*r*), unless a new contract exonerating him has been made in the bill of lading (*s*).

Where the consignee is an indorsee for value of the bill of lading from the charterer, or represents a shipper, other than the charterer, whether aware of the charter or not, he will only be bound by the lien for freight contained in the charter, as distinguished from the freight specified in the bill of lading, if a clear intention to that effect is shewn in the bill of lading (*t*). If a shipper ships goods in ignorance of the charter, he can decline to accept bills of lading for them in accordance with the charter but in an unusual form, and can demand his goods back free of expense, the liens in the charter or otherwise not attaching to them (*u*).

Case 1.—C. chartered a ship from A.:—"The ship to have a lien on cargo for freight, 70s. per ton . . . to be paid on unloading of the cargo." C. shipped goods under a bill of lading:—"Freight for the goods payable in L. as per charter," and indorsed the bill to F. for value. *Held*, that against F. the shipowners had a lien only for the freight due for the goods included in the bill of lading, and not a lien for the whole chartered freight (*x*).

Case 2.—C. chartered a ship from A., and put it up as a general ship: F. shipped goods in ignorance of the charter. The

(*r*) *McLean v. Fleming* (1871), L. R. 2 H. L. (Sc.), at pp. 133, 134; *Kern v. Deslandes* (1861), 10 C. B. N. S. 205; *Campion v. Colvin* (1836), 3 Bing. N. S. 17; *Small v. Moates* (1833), 9 Bing. 574; *Gledstones v. Allen* (1852), 12 C. B. 202. These cases, in view of later law, e.g., *Fry v. Mercantile Bank* (1866), L. R. 1 C. P. 689, must be limited strictly to the charterer and persons identical with him in interest, and many *dicta* in them are now no longer law.

(*s*) As in *Gullischen v. Stewart* (1884), 13 Q. B. D. 317; and suggested by Willes, J., in *Pearson v. Goschen* (1864), 17 C. B. N. S. at p. 374. As to new contracts in the bill of lading, see Article 18 (*a*); and *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67.

(*t*) *Pearson v. Goschen* (1864), 17 C. B. N. S. 352; *Foster v. Colby* (1858), 3 H. & N. 705; *Fry v. Mercantile Bank* (1866), L. R. 1 C. P. 689; *Gardner v. Trechmann* (1884), 15 Q. B. D. 154; *The Norway* (1864), B. & L. 226; *Red "R." S.S. Co. v. Allatini* (1909), 14 Com. Cas. 82. See also *ante*, Articles 18, 19. So far as *Gillkison v. Middleton* (1857), 2 C. B. N. S. 134, is contrary to this, it must be taken as overruled. See Article 150, note (*g*).

(*u*) *Peek v. Larsen* (1871), L. R. 12 Eq. 378; *The Stornoway* (1882), 51 L. J. Ad. 27; *et ante*, Article 18. Contrast *Ralli v. Paddington* (1900), 5 Com. Cases, 124.

(*x*) *Fry v. Mercantile Bank*, *vide supra*; *cf. Red "R." Co. v. Allatini*, *ubi supra*.

captain refused to sign bills of lading, except in terms of the charter, which gave liens for demurrage, dead freight, etc., and refused to deliver up the goods. *Held*, that A. was bound to re-deliver the goods to F. free of any claim for lien or charges (y).

Article 153.—Lien: how waived.

The shipowner's lien for freight may be waived: as by acceptance of a bill for the freight (z); by making the freight payable after the delivery of the goods (a); or by delivery without requiring payment, unless such delivery was induced by fraud (b).

Article 154.—Lien: how maintained.

The shipowner may do what is reasonable to maintain his lien, *e.g.* he may bring the goods back from their destination, if the lien is not discharged there (c). He will not lose his lien by consenting to hold as agent for the consignee (d), nor by warehousing the goods ashore, in his own, a statutory, or (*semble*) a hired warehouse (e). If the discharge of the cargo is delayed by the proper exercise of his lien by the shipowner, he will be entitled to recover demurrage for the delay (f).

Submitted.—In the absence of express agreement or statutory powers, the owner or captain has no power to

(y) *Peek v. Larsen* (1871), L. R. 12 Eq. 378; and see *ante*, Article 18.

(z) *Tamvaco v. Simpson* (1866), L. R. 1 C. P. 263; *Horncastle v. Farran* (1820), 3 B. & A. 497.

(a) *Foster v. Colby* (1858), 3 H. & N. 705.

(b) *Semble*, that, as such a delivery would not prevent stoppage *in transitu*, neither would it waive lien: *vide* Article 68, *ante*.

(c) *Edwards v. Southgate* (1862), 10 W. R. 528; *Cargo ex Argos* (1873), L. R. 6 P. C. 134.

(d) *Allan v. Gripper* (1832), 2 C. & J. 218; *Kemp v. Falk* (1882), 7 App. C. at p. 584.

(e) *The Energie* (1875), L. R. 6 P. C. 306; *Mors Le Blanch v. Wilson* (1873), L. R. 8 C. P. 227. See also *per* Willes, J., *Meyerstein v. Barber* (1866), L. R. 2 C. P. at p. 54.

(f) *Lyle v. Cardiff* (1899), 5 Com. Cases, 87, 94. Not so, however, if the exercise of the lien is unreasonable. See note to Article 128, *supra*, p. 341.

sell goods on which he has a lien, to realise the freight due on them, unless the goods, having been abandoned by all persons entitled to them, have become his property.

Note.—In the United Kingdom, the proceedings for maintaining and enforcing liens by means of warehousing with a stop for freight and sale are contained in 57 & 58 Vict. c. 60, §§ 492-501. See Appendix III., p. 466.

Lien for General Average: see Article 117.

Lien for Expenditure on Cargo: see Article 101.

Article 155.—Liens not supported by Common Law (g).

There is no lien at Common Law (*h*):—

(1.) For dead freight (*i*):

(2.) To the holders of a bill of exchange drawn against a particular cargo, on such cargo, in the absence of express intention to give such a lien (*k*):

(3.) To the shipowner, for wharfage dues on overside goods (*l*):

(4.) For port charges, though the charterer has agreed to pay them (*m*):

(5) For demurrage, or damages by detention (*n*):

(6.) On goods shipped on ship's account (*o*).

(*g*) See also Article 150, *supra*.

(*h*) As to lien by agreement for some of these things, see Article 157.

(*i*) *Phillips v. Rodie* (1812), 15 East, 547. See Article 161.

(*k*) *Robey v. Ollier* (1872), L. R. 7 Ch. 695; *Phelps v. Comber* (1885), 29 Ch. D. 813; *Ex parte Dever, In re Suse* (1884), 13 Q. B. D. 766; *Frith v. Forbes* (1862), 4 De G. F. & J. 409, the one case in which an express intention to give such a lien has been found, has been so doubted, see especially *Phelps v. Comber*, 29 Ch. D. 813, as to be a very unsafe authority to follow; see *Brown v. Kough* (1885), 28 Ch. D. 848.

(*l*) See Article 127 and notes; Appendix III.; *Bishop v. Ware* (1813), 3 Camp. 360. If, however, the goods have been justifiably landed under Article 127, the wharf-owner will have a lien for such wharfage dues.

(*m*) *Faith v. East India Co.* (1821), 4 B. & Ald. 630.

(*n*) *Birley v. Gladstone* (1814), 3 M. & S. 205, and see Article 54.

(*o*) *Swan v. Barber* (1879), 5 Ex. D. 120.

Article 156.—Lien of Broker.

A shipping agent or broker has a lien on the bill of lading and so indirectly on the goods, for his charges (*p*).

Article 157.—Lien by Express Agreement.

Where a lien for certain charges is expressly stipulated for, the fact that such a lien is inconvenient will be no answer to the express terms of the agreement (*q*). But the agreement for a lien will be limited to that for which it is expressly given (*r*).

Thus there may be liens by contract for:—

- (1.) Dead freight (*s*):
- (2.) Demurrage or damages for detention (*t*):
- (3.) Advance freight (*u*):
- (4.) Charterparty freight, as against the holder of the bill of lading (*x*):

(*p*) *Edwards v. Southgate* (1862), 10 W. R. 528.

(*q*) *McLean v. Fleming* (1871), L. R. 2 H. L. Sc. (at p. 135). The fact that a clause giving the lien is in the bill of lading is not conclusive that it is part of the contract between the parties: see *Crooks v. Allan* (1879), 5 Q. B. D. 38, and pp. 10, 11, *ante*.

(*r*) Thus a lien for "all freights, primages and charges" will not include a lien for interest on freight, even though the bill of lading stipulates for interest on freight: *E. Clemens Horst Co. v. Norfolk, &c. Co.* (1906), 11 Com. Cas. 141. Nor does a lien for "all charges whatsoever" cover a lien for dead freight: *Rederiaktieselskabet Superior v. Dewar*, (1909) 1 K. B. 948; 2 K. B. 998.

(*s*) See Article 161; see also *Rederiaktieselskabet Superior v. Dewar*, (1909) *ubi supra*. As to how far there can be a lien for unliquidated damages under the head of dead freight, see note to Article 161, *infra*.

(*t*) See Article 54. As to a lien at the port of discharge for demurrage accrued at the port of loading, see *Red. Superior v. Dewar*, (1909) 2 K. B. 998, distinguishing *Pederson v. Lotinga* (1857), 28 L. T. O. S. 267, and *Gardner v. Trechmann* (1884), 15 Q. B. D. 154. As to how far there can be a lien for unliquidated damages for detention, see Note to Article 54.

(*u*) See Article 137. Where a lien is given for advance freight under a time charterparty, under which hire is payable in advance fortnightly, the lien for each instalment cannot be exercised until it falls due: *Wehner v. Dene Co.*, (1905) 2 K. B. 92.

(*x*) See Articles 19, 144, 152. So there may be "a lien upon all cargoes and sub-freights for any amount due under the charter." Under such a clause the lien on sub-freight must be exercised against the consignee liable to pay the sub-freight, and money paid by him to charterer's

(5.) "All charges whatsoever" (y):

(6.) "All moneys becoming in any way due to the shipowners under the provisions of the bill of lading":

(7.) "All fines, and expenses, or losses by detention of or damage to vessel or cargo, caused by incorrect description of goods, or shipment of dangerous goods without notice":

(8.) "All previously unsatisfied freight and charges on other goods due in respect of any shipment by any steamer or steamers of this line from either shipper or consignee, such lien to be made available at shipowner's option by sale or otherwise" (z):

(9.) "When the goods are carried at a through rate of freight, the inland proportion thereof, together with the other charges of every kind (if any), are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole or part until payment thereof" (a).

agent cannot be followed into the hands of such agent and claimed from him by the shipowner: *Tagart Beaton v. Fisher*, (1903) 1 K. B. 391. But cf. *Wehner v. Dene Co.*, (1905) 2 K. B. 92.

(y) *Semtle*, is confined to charges specifically mentioned in the charterparty. *Rederiaktieselskabet Superior v. Dewar*, (1909) 2 K. B. 998 (C. A.), reversing on this point *Bray, J.*, in the Court below.

(z) See *Whinney v. Moss S.S. Co., Ltd.* (1910), 15 Com. Cas. 114, for a clause even more sweeping than the above. Such a clause does not give a right of lien superior to the right of an unpaid vendor who stops *in transitu*: *United States Co. v. G. W. Ry. Co.*, (1916) 1 A. C. 189.

(a) On this clause, in a through bill of lading, see *The Hibernian*, (1907) P. 277.

SECTION XII.

DAMAGES (*a*).*Article 158.—Rule of Damages.*

WHERE two parties have made a contract, which one of them has broken, the damages which the other ought to receive should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Thus where special circumstances exist, by reason of which a breach of the contract would cause greater loss than would naturally occur from the breach of a contract of that kind:—

(1.) If those special circumstances were known to both parties at the time of making the contract, and such knowledge formed the basis of the contract, the person breaking the contract will be liable for the damages naturally resulting from a breach under such special circumstances.

(2.) If such special circumstances were either unknown to the party breaking the contract, or being known did not form the basis of the contract, he will only be liable for the damages naturally and usually resulting from a breach of the contract without such special circumstances (*b*).

(*a*) As to damages for detention of the ship, see Section IX., Demurrage.

(*b*) *Hadley v. Baxendale* (1854), 9 Ex. 341, at p. 354; *Lepia v. Rogers*, (1893) 1 Q. B. 31; *Mayne on Damages*; *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Saxon Ship Co. v. Union S.S. Co.* (1898), 4 Com. Cases, 29; *Scott v. Foley* (1899), 5 Com. Cases, 53; *Agius v. G. W. Co.*, (1899) 1 Q. B. 413, with which *cf. Blyth v. Smith* (1843), 5 M. & Gr. 405.

Note 1.—In many charters there appears a clause in some such terms as "Penalty for non-performance of this agreement estimated amount of freight." Such a clause is inoperative, and is neglected by the Court (c). It is equally inoperative if in the form, "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight" (d). It is a mystery why the clause survives, except upon the supposition that chartering brokers regard it as a piece of sacred ritual (e). It may be worth while to mention that a shipowner who had chartered his ship to a foreigner, and had failed to send his ship to load, was sued by the charterer in a foreign Court. The charterer had procured a substituted ship at a slightly increased freight, and had therefore suffered only a small amount of damage. But the shipowner found himself sued in the words of the clause for the estimated amount of the whole freight. He found it difficult to explain to the Court that his contract did not mean what it said, and that this part of it did not mean anything at all. His experience may suggest that a real danger may arise from a continuance of respect to the superstition.

Note 2.—At Common Law, and in the Common Law Courts, interest on the amount of damages sustained cannot be recovered by a successful claimant, except in the circumstances provided for in sects. 28 and 29 of the Civil Procedure Act, 1833 (f). By the practice of the Admiralty

(c) *Harrison v. Wright* (1811), 13 East, 343; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Ströms Bruks v. Hutchinson* (1904), 6 Sess. Cas. (5th Ser.) 486; (1905) A. C. 515.

(d) *Wall v. Rederiaktiebolaget Luggude*, (1915) 3 K. B. 66; *Watts v. Mitsui*, (1917) A. C. 227.

(e) Even the Admiralty form of time charter (so well known during the war as T. 99) solemnly provides: "Penalty for non-performance of this agreement proved damages." The ritual is a survival from very early times. Malynes, *Lex Mercatoria* (1686), in setting out the usual terms of a charterparty, says, at p. 100: "They bind themselves each to the other for the performance thereof in a sum of money *Nomine Pænæ*." Note the survival of this phraseology as late as 1870 in the charterparty of *The Nuova Raffaella* (1871), L. R. 3 A. & E. at p. 484. In an unprogressive country such archaisms survive longer. In a charterparty of an American ship made in San Francisco on 9 August, 1920, one could find this: "To the true and faithful performance of each and all of the foregoing agreements we, the said parties, do hereby bind ourselves, our Executors, Administrators, and assigns, each to the other, in the penal sum of Estimated Amount of the Charter."

(f) 3 & 4 Will. 4, c. 42. There are cases in which interest on money is itself the measure of damages, e.g., *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Red "R." S.S. Co. v. Allatini* (1906), 14 Com. Cas. 92. But these are not cases in which interest on the amount of damages from the time of their being sustained is recovered.

Court, however, interest on the amount of damages from the time when the plaintiff's claim arose is allowed (*g*). By reason of this divergence of practice there is some slight advantage to a plaintiff who brings a successful claim in the Admiralty rather than in the King's Bench Division.

Note 3.—Where in an English Court damages for breach of contract are assessed in a foreign currency, the date at which, for the purpose of fixing the amount of the judgment in sterling, the rate of exchange is to be taken is the date when the damage was sustained, not the date of the judgment (*h*).

Article 159.—Damages for Failure to Load (i).

In an action against charterer for not loading a cargo, the measure of damage under the older authorities is the amount of freight which would have been earned under the charter (*j*), after deducting the expenses of earning it, and also any net profit the ship may, or might, have earned during the period of the charter (*k*). If the expense of earning freight on a substituted voyage of the same duration be the same as on the chartered voyage, the same result is arrived at by taking the difference between the charterparty rate of freight and the market

(*g*) *The Gertrude* (1837), 12 P. D. 204; 13 P. D. 105. Cf. *Smith v. Kirby* (1875), 1 Q. B. D. 181; *The Kong Magnus* (1891), P. 235.

(*h*) *Lebeaupin v. Crispin* (1920), 25 Com. Cas. 335; *Di Ferdinando v. Simon Smits*, (1920) 3 K. B. 409. As to damages for tort, see *The Celia*, (1921) 2 A. C. 544.

(*i*) This will be the form of action if a charterer wrongfully throws up the charter under a cancelling clause: *Hick v. Tweedy* (1890), 63 L. T. 765.

(*j*) As to method of calculation, see Article 144; and *Copper v. Forster* (1837), 3 Bing. N. C. 938; *Cockburn v. Alexander* (1848), 6 C. B. 791; *Warren v. Peabody* (1849), 8 C. B. 800; see also Mayne on Damages (9th ed.), p. 287. For a complicated case of assessing damages after a fire, see *Aitken, Lilburn & Co. v. Ernsthausen*, (1894) 1 Q. B. 773. If the charter stipulates for goods of a certain size, and goods of a different size are loaded, the measure of damages will be the difference of freight involved: *Young v. Canning Jarrah Co.* (1899), 4 Com. Cases, 96. For special cases of damage, see *Sparrow v. Paris* (1862), 7 H. & N. 594; *Heugh v. Escombe* (1861), 4 L. T. 517. Where the ship has been kept on demurrage before the refusal to load, the agreed rate of demurrage for the period of detention must be added to this: *Saxon Ship Co. v. Union S.S. Co.* (1898), 4 Com. Cases, 29.

(*k*) *Smith v. Maguire* (1858), 3 H. & N. 554; *Staniforth v. Lyall* (1830), 7 Bing. 169.

rate of freight. And in modern times this would probably be laid down as the primary measure of damage (l).

In an action against shipowner for not furnishing a ship to receive cargo under a charter, the measure of damage is the market value of the ship to the charterer at the time she should have loaded, viz. the rate of freight she could obtain at that time, less the amount which the charterer must have paid to get her, i.e. the freight payable under the charter which was broken. If the charterer in fact chartered a vessel to replace her, the excess freight he has to pay will be, *primâ facie*, the measure of damages (m); but he need not make a substituted charter if the rate of freight demanded is unreasonable (n).

The loss of profit on cargo shut out cannot usually be recovered either under a charter or a shipping engagement (o).

When, however, a substituted ship cannot be procured, the measure of damages payable to the charterer is the cost of replacing the goods at their port of destination at the time when they ought to have arrived, less the value of the goods at the port of shipment and the amount of the freight and insurance upon them (p).

(l) See Note 2 at end of this Article.

(m) *Featherston v. Wilkinson* (1873), L. R. 1 Exch. 122; see also *Parker v. James* (1814), 4 Camp. 112. For a Scotch case in which the charterers recovered this measure of damages after cancelling the charter under a cancellation clause, see *Nelson v. Dundee East Coast S.S. Co.* (1907), Sess. Cas. 927.

(n) Just in the same way in the sale of goods when the seller fails to deliver, the buyer need not in fact buy other goods, but may claim on the difference of market prices if he had bought.

(o) *Scaramanga v. English* (1895), 1 Com. Cases, 99. To make such profit recoverable, the shipowner must know of the contract under the circumstances stated by Willes, J., in *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. at p. 509. "The mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances, that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." So profit lost on goods cannot be recovered in an ordinary action for shutting out: *Hecker v. Cunard S.S. Co.*, before Bigham, J., Commercial Court, August, 1898.

(p) *Ströms Bruks Aktiebolag v. Hutchison*, (1905) App. Cas. 515. Query whether this rule was consistently applied in assessing the

The owner, or captain, or charterer, is not bound to accept another offer inconsistent with the charter before there has been a final breach of the charter by the charterer or shipowner, accepted by himself (q).

As to the damages if the charter is for a named kind of cargo and the charterer ships a different kind, see p. 147, *supra*.

Case 1.—Charterers of a vessel, alleging that through delay in the ship's arrival they were not liable to load her, offered, before the expiration of the lay-days, to provide a cargo if the master would go under protest to an island ninety miles off. *Held*, that the master was not bound to accept such an offer, which he might reasonably believe would amount to rescinding the original charter (r).

Case 2.—A ship was chartered to go to X., where the charterer was either to load or to give notice that he would not load, paying at the same time £500. The ship went to X. The charterer neither loaded nor gave the notice; the ship returned by Y., making a larger freight than if she had returned straight from X. *Held*, that the shipowner could not recover the £500, as the charterer had given no notice, but only unliquidated damages, and that, as he had profited by the breach, the damages were nominal (s).

Case 3.—A's ship was chartered by C. to load coal at X. and proceed to Z. A. broke his contract. C. chartered another vessel, at a higher freight, and purchased coal at a higher price, the first cargo being lost through the delay. *Held*, C. could recover from A. as damages: (1) the excess freight paid; (2) *primâ facie*, the

damages in *Watts v. Mitsui*, (1917) A. C. 227. The charterers were given the difference between the price at which, five months before the shipowners' breach, they had agreed to buy the goods for shipment, and the value they would have had at the port of delivery, less the cost of freight and insurance. But the price at which they had so agreed to buy was not necessarily the value of the goods at the port of shipment when the shipowner failed to provide the ship; indeed the charterers had to pay £4,500 to their vendors to cancel the purchase. There was no evidence of any market value of the goods at the port of shipment at the date of the shipowners' breach, but if the charterers acted reasonably (and the contrary does not appear to have been contended), their action seems to shew that that value was about £4,500 less than their contract price of purchase.

(g) *Harries v. Edmonds* (1845), 1 C. & K. 686; *Hudson v. Hill* (1874), 43 L. J. C. P. 273. See Note 2, *infra*.

(r) *Hudson v. Hill* (1874), 43 L. J. C. P. 273.

(s) *Staniforth v. Lyall* (1830), 7 Bing. 169; *Bell v. Puller* (1810), 2 Taunt. 286, where the charterer was allowed to earn both charter freight and freight *aliunde*, turns on an express proviso in the charter.

excess price of coal, but that A. might meet this by shewing a corresponding rise in the value of coal at Z. (t).

Case 4.—A ship was chartered to load a grain cargo of “not less than 13,000 quarters.” She only loaded 12,500 quarters. *Held*, the charterers could not recover their loss of profit under a contract for the sale of 13,000 quarters (u).

Case 5.—A’s ship was chartered by C. to carry 500 tons of wood pulp in September from Sweden to the U.K. C. had sold the cargo to P. for delivery in the U.K. A. failed to send his ship to load altogether. C. was unable to charter any other ship, and had to make default under his contract with P. P. bought 500 tons against C., and C. had to pay P. £700 as the difference in price. In an action by C. against A., *held*, that C. could recover this £700 as being the extra cost of supplying at the port of destination goods of the amount and description agreed to be carried there by A. (x).

Case 6.—A. chartered a ship from her owners to load a cargo at 21s. a ton with a cancelling date September 15. A. sub-chartered the vessel to B. to load a like cargo at 28s. 6d. a ton with cancelling date December 15. The ship was ready to load after September 15 but before December 15. B. refused to load. Freight had then fallen to 17s. a ton. A. cancelled his charter-party with the owners. *Held*, that A.’s damages against B. were the difference between 28s. 6d. and 21s., not the difference between 28s. 6d. and 17s. (y).

Note 1.—“*To load in regular turn.*”—Where the “regular turn” is lost through the negligence of one of the parties, he will be liable for all subsequent delay resulting from such loss. Thus, a ship chartered to load in “regular turn” lost her turn through default of the charterer, and was detained eleven days till her turn came round again, when she was detained three days by weather before she could begin to load. *Held*, that the charterer was liable for the whole fourteen days’ delay, the three days’ delay being the legal and natural consequence of his first default (z).

Note 2.—*Duty to mitigate Damages.*—A party claiming damages must assess them on a reasonable basis, and the phrase that he must mitigate damages has often been used. There is, however, some ambiguity and confusion in its use. If a man allege that he has sustained £100 damages, it may be shewn that if he had acted somehow differently, or had

(t) *Featherston v. Wilkinson* (1878), L. R. 8 Ex. 122.

(u) *Scaramanga v. English* (1895), 1 Com. Cases, 99.

(x) *Ströms Bruks Aktiebolag v. Hutchison*, (1905) App. Cas. 515.

(y) *Weir v. Dobell*, (1916) 1 K. B. 722.

(z) *Jones v. Adamson* (1875), 1 Ex. D. 60; see also *Taylor v. Clay* (1846), 9 Q. B. 713.

taken a certain course, his loss might have been only £50. It may be said, and in older cases was more commonly said, that he must mitigate his damages and so reduce them to £50. But in most cases it may equally be said, and in modern times probably would be said, that £50 was, and £100 was not, the true measure of his damages. The extra £50 "loss" has resulted, not from the breach of contract, but from his own action or abstention.

So, where a charterer refuses to load, the older cases indicate, as the shipowner's measure of damages, the loss of profit on the charter (*i.e.* the freight to be earned less expense of earning it), against which the shipowner must give credit for what profit he can earn by a substituted employment of the ship. And it was said that he must mitigate the damages by accepting such substituted employment (*a*). It would be more accurate to say, and nowadays it is thought would be said, that his true measure of damages is the loss of profit he sustains by breach of the charterparty less the profit he can earn by using the ship elsewhere during the same period, just as a servant's damages for wrongful dismissal are the wages he would have earned under the broken contract less what he can earn elsewhere by being set free.

There are some further questions which arise as to "mitigation of damages," when the true measure of damages is applied. These require a little analysis. I. A breach of contract arises (*b*): (*i.*) when at the time due for performance by him one party fails to perform his part, and (*ii.*) when before the time for his performance one party announces that he is not going to perform *and* the other party accepts such announcement as a repudiation. In the latter case until such acceptance by the other party there is

(*a*) Cf. *Harries v. Edmonds* (1845), 1 C. & K. 686; *Bradford v. Williams* (1872), L. R. 7 Exch. 259. In *Smith v. McGuire* (1858), 3 H. & N. 554, Martin, B., at p. 567, suggests a doubt whether the shipowner is bound to find substituted employment for his ship, or to give credit for what he could earn on such substituted employment. This cannot be correct. Of course, the shipowner need not employ his ship unless he likes, just as a servant wrongfully dismissed may take a holiday if he likes. But if the charterer refuse to load under a charter on which the shipowner would earn £1,000, and, freight having arisen when he refuses, the shipowner could at once get a cargo for the same voyage on which he would earn £1,200, clearly the shipowner's damages are only nominal, just as would be those of a wrongly dismissed servant suing for £100 as six months' salary, if it be shewn that instead of taking a holiday he could have earned £120 in the same period.

(*b*) In Sir William Anson's phrase, there is "a discharge of contract by breach."

no breach, and, failing such acceptance, there will be no breach until at the due time for performance a breach arises under (i.). II. When there is a breach of contract by one party the damages of the other party are what he loses by the non-performance upon the due date of performance, *i.e.*, in nearly all commercial cases nowadays, the difference between the contract price or rate and the market price or rate at the date when there should have been performance. But in the case of a breach before the due date of performance (by the acceptance of a repudiation under I. (ii.) above) there are two means of estimating this difference of prices or rates at the due date of performance, *i.e.* (i.) by ascertaining at the date of the breach what are the forward prices or rates of the market for the future date of performance, and (ii.) by waiting until the due date of performance and then ascertaining the spot market rates or prices.

It is conceived that, in cases in which "mitigation of damages" has been discussed, there has not been drawn a sufficiently clear distinction between two quite different questions that arise on the foregoing considerations (c). And these are: *First*, when one party announces his intention to fail in future performance, is it in any case the duty of the other party to accept such repudiation and so create a breach, or has he an unfettered right, by refusing to accept, to postpone any breach until the due date for performance? *Secondly*, when a breach has occurred before the due date for performance (by acceptance of a repudiation), is the party claiming damages bound, or entitled, to estimate them on the basis of the forward market rates or prices for the future date of performance that are ruling at the date of the breach, or is he bound, or entitled, to wait and estimate them on the basis of spot rates or prices at the due date for performance? If he sues immediately on the breach occurring he can, of course, on the latter alternative, calculate, if at all, only on a forecast.

The answer to the first question is clear. "In no case is the other party bound to accept a repudiation made before the date of performance, and so create a breach; and in every case, by refusing such acceptance, he can postpone any breach until the time due for performance (d). The

(c) In *Michael v. Hart*, (1902) 1 K. B. 482, Collins, M.R., discusses the first question at p. 490, and goes on to the second question at p. 491.

(d) *Frost v. Knight* (1872), L. R. 7 Exch. 111; *Brown v. Muller* (1872), L. R. 7 Exch. 319; *Hudson v. Hill* (1874), 43 L. J. C. P. 273;

threat to repudiate has no effect on the contract until either it is accepted by the other party, or is acted on at the time for performance (e). It results that at any time before such acceptance the party who has so threatened may withdraw his repudiation and be in the same position as if he had never threatened at all (f).

The answer to the *second* question is not so clear. In *Brown v. Muller* (g) the damages were fixed at the dates for performance, and not at forward prices ruling at the date of the breach, and it was said that the claimant was not in any case bound to adopt the latter alternative. In *Roper v. Johnson* (h), the damages were again fixed on prices at the dates for performance, but it was said that, if that were the reasonable course to adopt, the claimant ought to "mitigate the damages" by ascertaining them on prices at the date of the breach. In *Roth v. Tayssen* (i) damages were claimed, as in the two previous cases, on prices at the date for performance. But it was held that the claimant, if he had acted reasonably, would have fixed them upon prices at the date of the breach, and that he could only claim them on the latter basis. Though the point did not arise, the principle of this last case was approved in *Nickoll v. Ashton* (k). The conclusion seems to be that the claimant must act reasonably and assess his damages (or "mitigate" his damages by assessing them) on whichever basis results in the smaller amount. Theoretically, of course, this involves him in the duty of forecast or prophecy at the date of the breach, and inasmuch as "the market" may be supposed

Tredegar Co. v. Hawthorn (1902), 18 T. L. R. 716; *Michael v. Hart*, (1902) 1 K. B. 492. If or so far as it involves the contrary, *Wilson v. Hicks* (1857), 26 L. J. Exch. 242, is wrong.

(e) Cf. *Avery v. Bowden* (1856), 6 B. & B. 953.

(f) *Braithwaite v. Foreign Hardwood Co.* (1905), 2 K. B. 543, is not really inconsistent with this principle. It was found by Kennedy, J., that the plaintiff had accepted the defendant's repudiation as a final repudiation. This essential fact is obscured by the plaintiff's having subsequently tendered documents for later shipments, an unnecessary, and in some ways an inconsistent proceeding. *Braithwaite's case* is one that is "often misunderstood," (per Greer, J., *Taylor v. Oakes*, (1922) 27 Com. Cas. at p. 268, and "as reported is not easy to understand" (per Lord Sumner, *British & Beningtons v. North Western Cachar Co.*, (1923) App. Cas. at p. 70).

(g) (1872), L. R. 7 Exch. 319.

(h) (1873), L. R. 8 C. P. 167.

(i) (1896), 1 Com. Cas. 240, 306.

(k) (1900) 2 Q. B. 298. Query in that case whether the repudiation of the contract (if it had been one) was accepted, i.e., whether under the first question discussed above there was a breach, by acceptance of repudiation, before the time for performance.

to have at least the same power of successful prophecy it would seem to be reasonable, in any case, to fix the amount of damages on forward prices at the date of the breach. For if prices by the date for performance have become more favourable to the party who has broken the contract, that can only be because the forecast of "the market" at the date of the breach has been falsified. If, therefore, at the date of the breach arising upon an accepted repudiation, the claimant in fact buys (or sells) goods for delivery at the forward date of performance, it would appear that he can claim the amount of the damages thus fixed. Where, however, a buyer did not in fact buy at the date of the breach, and prices at the date for performance had fallen below the contract price, he was not allowed to claim the damages he would have sustained if he had bought forward at the date of the breach (l).

Another example of what may be called the duty to "mitigate" damages is seen in the principle that an owner cannot claim damages for detention of his ship, if by taking a certain reasonable course he could have avoided such detention (m). So also in *Weir v. Dobell* (n), if the plaintiffs had not cancelled the head charterparty, and had had to load the ship at the market rate of 17s., the defendants would no doubt have been able to contend that the plaintiffs ought to have acted reasonably, and by such cancellation of the head charterparty have reduced the damages from 11s. 6d. to 7s. 6d. a ton.

Note 3.—"The question upon a breach of contract is what is the condition in which the plaintiffs would be if the defendant had performed the contract. Generally speaking, where there are several ways in which the contract *might* be performed, that mode is adopted which is the least profitable to the plaintiff and the least burthensome to the defendant" (o). The commonest application of this is in a contract for the sale of goods of a maximum and minimum quantity at the seller's option, and the seller fails to deliver anything: he pays damages on the minimum quantity (p). But the possibility indicated in the word "*might*," italicized above, is the actual, not the theoretical, possibility. The difference between the two does not arise as regards a quantity of goods procurable in the market. But if a ship-

(l) *Melachrino v. Nicholl & Knight*, (1920) 1 K. B. 693.

(m) See note to Article 128, p. 341.

(n) (1916) 1 K. B. 722, cited as Case 6 on p. 424.

(o) *Maule, J., Cockburn v. Alexander* (1848), 6 C. B. 791, at p. 814.

(p) *Cf. In re Tharnett & Fehr and Yuills, Ltd.*, (1921) 1 K. B. 219.

owner engages under a charter to provide one of his own ships to carry not less than 1,500, and not more than 2,000 tons, and in fact the smallest ship he owns which he could use would carry 1,700 tons, he must pay damages on 1,700, not upon 1,500 tons (*q*).

Article 160.—Damages for Failure to carry safely, or in Reasonable Time.

Where goods are not delivered by the vessel contracting to carry them (*r*), the damages will, in the absence of special circumstances in the contract, be the market value (*s*) of the goods when they should have arrived, less the sums which the cargo-owner must have paid to get them, such as freight (*t*). Similarly if goods are delivered but in a damaged condition, the damages, in the absence of special circumstances in the contract, will be the difference between the market value the goods would have had on arrival, if undamaged, and their value in the damaged condition.

Under sect. 503 of the Merchant Shipping Act, 1894 (*u*), the shipowner (*x*), if the loss has happened

(*q*) *Blane, Wright & Co. v. Thoresen*, Lloyd's List, 10 June, 1918. See also *Thomas v. Clarke* (1818), 2 Stark. 450. So in a contract to sell 10 to 15 cwt. of goods in cases, if commercially the goods were only obtainable in cases of 4 cwt. each, the damages on failure to deliver anything must be on 12 cwt., not on 10 cwt.

(*r*) *Cf. Smith v. Tregarthen* (1887), 56 L. J. Q. B. 437.

(*s*) Where there is no market the damage must be ascertained otherwise so as reasonably to compute the loss sustained. See *e.g. Montevideo Gas Co. v. Clan Line* (1921), 37 T. L. R. 866, where shipowners carrying gas coal to a gas company delivered a different parcel of steam coal by mistake.

(*t*) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67; *Williams v. Agius*, (1914) A. C. 510. *Cf. Slater v. Hoyle*, (1920) 2 K. B. 11. For a case where the consignee's *proprâ facie* measure of damages, market value of the goods not delivered, was reduced to a small sum by reason of his having been indemnified *aliunde* for most of those damages, see *Montgomery v. Hutchins* (1905), 94 L. T. 207. See also *Weir v. Dobell*, (1916) 1 K. B. 722, Case 6 on p. 424.

(*u*) See *infra*, p. 472.

(*x*) A charterer who has contracted personally by a bill of lading for the carriage of goods (as *e.g.*, in *The Okehampton*, (1913) P. 173), apparently will not, unless he is a charterer by demise, have the benefit of either sects. 502 or 503 of the Merchant Shipping Act, 1894. See *The Hopper*, No. 66, (1908) A. C. 126.

without his actual fault or privity, is not liable in respect of the loss of or damage to goods in excess of an aggregate amount of £8 per ton of the ship's tonnage (y), with interest thereon from the date of the claim arising (z).

As regards delay in delivery of goods, the ordinary measure of damages against a carrier by land is the difference between the market price at the time when the goods should have been delivered and at the time when they were delivered (a). In the case of an ocean voyage of uncertain duration this measure may not be applicable, if the parties cannot be taken to have contracted with any reasonable expectation as to the length of the transit or the state of the market. In such a case, therefore, the cargo-owner can only recover damages in the form of interest on their value during the delay (b); and the damages recoverable will not include damage by loss of market (c), or by a fall in the price of such goods (d), or by stoppage of business through their non-delivery (e),

(y) Where liability for the loss is admitted the usual and convenient course is a limitation suit in the Admiralty Division. Where a ship-owner is sued for loss of goods, and disputes liability, but fears that the damages of the plaintiff and of similar claimants may exceed the statutory limitation, it is well for him to counterclaim in the alternative a declaration that, if liable, he is entitled to limit his liability under the section and ask for a stay of execution pending the prosecution of a limitation action in the Admiralty Court.

(z) *The Northumbria* (1869), L. R. 3 A. & E. 6; *Smith v. Kirby* (1875), 1 Q. B. D. 131.

(a) *Collard v. S. E. Railway Co.* (1861), 7 H. & N. 79.

(b) *Cf. British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499.

(c) Many bills of lading expressly provide that the ship shall not be liable for claims for delay, loss of market, or sea risks, if the goods are carried past their destination. The Eastern trade, however, has usually the clause: "That such goods are when found to be sent back at ship's risk and expense, and subject to any proved claim for loss of market." The stipulation that the shipowner shall not be liable for more than the invoice cost of the goods is very usual (see note at end of this article). There is sometimes a clause, "price in case of short delivery, to be the market price of the day at port of discharge, on the day of steamer's reporting, less charges and brokerage." There are usually clauses limiting the time within which claims will be recognised. See *ante*, p. 337.

(d) *The Parana* (1877), 2 P. D. 118. See also, for a case of tort, *The Notting Hill* (1884), 9 P. D. 105; and the principles laid down in the collision cases of *The Argentino* (1889), 14 App. Cas. 519 (loss of freight); *The Blenheim* (1885), 10 P. D. 167 (damage to cargo); *The City of Peking* (1890), 15 App. C. 438 (damages for detention).

(e) *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499.

and will not be affected by the fact that the cargo-owner had sold the goods to arrive at a price higher (*f*) or lower (*g*) than the market price in fact on the presumed date of arrival.

This exception, however, to the ordinary rule as to a carrier's liability does not necessarily apply to all sea voyages. And therefore where the voyage is one whose duration can be more or less accurately predicted (*h*), and where it is part of the common knowledge of the contracting parties that the goods are wanted for a particular market, or for a particular season, at which they will command a special price, or to fulfil a special sub-contract, damages for the loss of such market, season, or sub-contract may be recovered (*i*).

As to interest on damages, see Note 2 on p. 420.

Note.—A clause is not uncommonly inserted in bills of lading to the effect, "Owners not to be liable in any case beyond the net invoice cost of the goods damaged or short delivered." It has been held that such a clause means that profit only on the goods is to be excluded, and that therefore the freight (if paid or payable) is to be added to the actual invoice price of the goods (*k*).

Case 1.—Goods shipped on A.'s ship were lost through causes for which A. was liable. The shippers had paid part of the freight in advance, and without A.'s knowledge had sold the goods to arrive for £3 per ton. The market price on the day when the ship should have arrived was £3 5s. per ton. *Held*, that the shippers were entitled to recover £3 5s. per ton less what they must have paid to get the goods; viz., the balance of the freight (*g*).

Case 2.—F. shipped goods on A.'s ship, and afterwards, unknown to A., effected a sub-contract for resale of them. The goods were damaged by bad stowage, and in consequence F. was unable to fulfil the sub-contract. *Held*, that F. could not recover the profits lost under the sub-contract as damages from A. (*l*).

(*f*) *The St. Cloud* (1863), B. & L. 4.

(*g*) *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67; *Williams v. Agius*, (1914) A. C. 510; cf. *Slater v. Hoyle*, (1920) 2 K. B. 11.

(*h*) See per Collins, M.R., *Dunn v. Currie*, (1902) 2 K. B. 614, at p. 623; *Sargant v. East Asiatic Co.* (1915), 21 Com. Cas. 344.

(*i*) *The Parana* (1877), 2 P. D. 118.

(*k*) *Nelson v. Nelson*, (1906) 2 K. B. 804.

(*l*) *The St. Cloud* (1863), B. & L. 4.

Case 3.—A.'s master E. signed bills of lading for 400 bales of cotton at Wilmington, "shipped on board the *Carbis Bay* for Liverpool." The ship could only take 165 bales, and E. ordered the remaining 235 bales to be shipped on board the *Wylo*, also for L. The *Carbis Bay* arrived on October 26, the *Wylo* on October 29; between these dates the price of cotton fell. The shippers sued E. under the Bills of Lading Act for damages for the non-delivery by the *Carbis Bay*. *Held*, that on such non-delivery, the shippers were entitled to the market value of the goods on October 26 as damages; that they might receive the goods *ex Wylo* on October 29, in part-satisfaction of such damages; but were still entitled to recover the difference in price between October 26 and 29 as damages (*m*).

Case 4.—F. shipped hemp on A.'s ship; owing to defective engines, the ship was 127 days on the voyage, 65 days being an average voyage. During the delay the price of hemp fell; and the consignee claimed his loss as damages from A. *Held*, he could not recover it (*n*).

Case 5.—F. ships cattle from the States for the Christmas Smithfield market, such shipment and the usual fall of the price of dead meat after Christmas being well known in the cattle trade. Owing to the ship's unseaworthiness, the cattle miss the Christmas market. Submitted, that the shipper can recover the loss by the fall in price (*o*).

Case 6.—F. shipped on A.'s ship several cases containing machinery for a sawmill at Z., and described as "merchandise." A. knew the general nature of the shipment. On arriving at Z. one of the cases was missing, and the sawmill could not be erected till it had been replaced. *Held*, that F. was entitled to the cost of replacing the missing machinery at Z., and to 5 per cent. interest on such cost, for the delay, but not to damages for the estimated profits of the mill during the delay (*p*).

Case 7.—F. shipped goods in the United States for transit to South Africa at the outbreak of the war between Great Britain and the Transvaal. It was known that the goods were shipped for the British troops, and would sell at a higher price if delivered in due course than later. The goods were delayed by the fault of the shipowner. *Held*, that F. could recover fall in market as damages for delay (*q*).

(*m*) *Smith v. Tregarthen* (1887), 56 L. J. Q. B. 437. The claim was for non-delivery, not for delayed delivery (*cf.* a similar claim for non-delivery in *Sargant v. East Asiatic Co.* (1915), 21 Com. Cas. 344). If the *Carbis Bay*, with all the bales on board, had been unjustifiably delayed from Oct. 26 to Oct. 29, the shippers could not have recovered for the fall in the market. See *The Parana* (1877), 2 P. D. 118.

(*n*) *The Parana* (1877), 2 P. D. 118.

(*o*) On authority of Mellish, L.J., in *The Parana*, *supra*, at p. 121, but a similar point was actually so decided by the Court of Appeal in an unreported case in 1881.

(*p*) *British Columbia Co. v. Nettleship* (1868), L. R. 3 C. P. 499.

(*q*) *Dunn v. Currie*, (1902) 2 K. B. 614.

Article 161.—Dead Freight.

“Dead freight” is the name given to damages claimed for breach of contract by a charterparty to furnish a full cargo to a ship (*r*).

For such damages no lien on goods actually carried in the ship exists at Common Law (*s*); but such a lien may be given by usage, or express contract of the parties (*r*).

Case 1.—A vessel was chartered to carry a full cargo of bones at so much per ton, the shipowner to have a lien on the cargo for “freight, dead freight, and demurrage.” Only 386 tons were shipped; 210 tons more could have been shipped. The master claimed a lien on the cargo shipped for damages for failure to ship the 210 tons. *Held*, that the charter gave him such a lien (*r*).

Case 2.—A ship was chartered to load a full cargo at named freights, “but if the ship should not be fully laden, C. to pay not only for the goods which should be on board, but also for so much in addition as the ship could have carried. And, in case no goods were shipped, then C. should at the end of the voyage pay full freight for the vessel to A. as if she had been fully loaded.” A full cargo was not shipped, and the master claimed a lien on the goods carried for “dead freight” due for goods not carried. *Held*, that no such lien existed at Common Law (*t*).

Note.—It was for a long time doubtful whether the term “dead freight,” in a clause in a charterparty giving a lien for dead freight, must not be confined to liquidated damages, *i.e.*, damages for failure to furnish a full cargo ascertained, or at any rate ascertainable, from the charter itself. The cases of *Pearson v. Goschen* (1864) (*u*) and *Gray v. Carr* (1871) (*x*) supported this view. Against it was the Scotch case of *McLean v. Fleming* (1871) (*r*) decided by the House of Lords, but this was distinguished by the judges who decided *Gray v. Carr* (*x*). Incidentally they pointed out the inconvenience of a lien existing for an unascertained or unascertainable amount (*y*), an incon-

(*r*) *McLean v. Fleming* (1871), L. R. 2 H. L. (Sc.) 128.

(*s*) *Phillips v. Rodie* (1812), 15 East, 547; *Birley v. Gladstone* (1814), 3 M. & S. 205.

(*t*) *Phillips v. Rodie*, *vide supra*.

(*u*) 17 C. B. N. S. 352.

(*x*) L. R. 6 Q. B. 522.

(*y*) *Cf. Clink v. Radford*, (1891) 1 Q. B. 625, *per* Lord Esher, at p. 629, Bowen, L.J., at p. 631, Fry, L.J., at p. 633. Cleasby, B., however, makes the just observation that a lien for general average

venience which is as obvious from the commercial as from the legal point of view.

The question has become one of academic interest only (z): for it must be taken that *Pearson v. Goschen* (a) and *Gray v. Carr* (b) are upon this point overruled by *McLean v. Fleming* (c), in view of the decision of the House of Lords in *Kish v. Taylor* (d), upholding the decision of Walton, J., to the same effect (e).

Article 162.—Damages for not signing or presenting Bills of Lading, etc. (f).

A clause requiring the captain to sign bills of lading within a certain time or pay a specified sum per day as liquidated damages for delay, or until the ship is totally lost or the cargo delivered, imposes a penalty, and the damages specified cannot be recovered, but only the actual damage sustained, which must be proved (g).

Where it is the duty of the charterer to present bills of lading for signature, he must do so within a reasonable time from completion of the loading (h), even if that is completed before the lay-days expire (i). If the ship is detained in port by his delay in doing so the shipowner can recover his actual loss as damages for detention, and

contribution is equally in respect of an amount that cannot be known until an adjustment has been prepared, and yet that lien has always been recognised, and does not in fact create inconvenience in its exercise: *Gray v. Carr* (1871), L. R. 6 Q. B. at p. 530.

(z) It was discussed more elaborately in a note to this Article 161 in the first six editions of this work.

(a) 17 C. B. N. S. 352.

(b) L. R. 6 Q. B. 522.

(c) *McLean v. Fleming* (1871), L. R. 2 H. L. (Sc.) 128.

(d) (1912) A. C. 604; see the argument at p. 612 and judgment at p. 614.

(e) (1910) 2 K. B. 309. See also *Bray, J., in Red "R." S.S. Co. v. Allatini* (1909), 14 Com. Cas. 82, at p. 92.

(f) As to a charterer's liability for damages for detention of the ship at a port of call for orders by his not giving orders promptly, see pp. 124 and 375, *supra*. As to his liability for damages for detention of the ship from his shipping dangerous cargo, see pp. 117, 118, *supra*.

(g) *Jones v. Hough* (1880), 5 Ex. D. 115; *Rayner v. Rederiaktiebolaget Condor*, (1895) 2 Q. B. 289; *The Princess* (1894), 70 L. T. 388.

(h) *Oriental S.S. Co. v. Tylor*, (1893) 2 Q. B. 518.

(i) *Nolisement Co. v. Bunge*, (1917) 1 K. B. 160.

his claim is not limited to either (i.) the demurrage rate fixed by the charter, or (ii.) an abatement from dispatch money payable to the charterer (*i*).

• Where advance freight is made payable on signing bills of lading, and the shipper wrongfully delays to present bills for signature till after the ship is lost, the amount of the advance freight may be recovered as damages for failure to present bills of lading (*h*).

SECTION XIII.

JURISDICTION.

THE following English tribunals have jurisdiction to decide disputes arising on charterparties or bills of lading:—

- I. The High Court of Justice; either in
 - (a.) The King's Bench Division, or
 - (b.) The Probate, Divorce, and Admiralty Division: Admiralty Jurisdiction (a).
- II. The County Courts.
 - (a.) Under their Admiralty Jurisdiction;
 - (b.) Under their Common Law Jurisdiction.

I. THE HIGH COURT OF JUSTICE.

With the limitations mentioned below, the King's Bench Division has jurisdiction to decide all disputes arising on charterparties and bills of lading.

The Court of Admiralty had, before 1873, no original jurisdiction over claims arising on charterparties and bills of lading (b), other than that arising under the Act of 1861 (c). The Judicature Act of 1873 (d) gave to every judge of the High Court any jurisdiction which might have been exercised by any single judge of the Courts whose jurisdiction was transferred to the High Court. The two judges of the Admiralty Division have

(a) Up to about 1650 all questions about contracts of affreightment were commonly decided in the Court of Admiralty. From about that time the activity of that Court began to decline, and such cases began to be brought in the common law Courts. Perhaps the first reported case in the latter is *Evans v. Marlett* (1697), 1 Ld. Raym. 271.

(b) Cf. *The Cargo ex Argos* (1872), L. R. 5 P. C. at p. 146.

(c) 24 Vict. c. 10, s. 6. This is now repealed by sect. 21 and replaced by sect. 5 of the Administration of Justice Act, 1920.

(d) 36 & 37 Vict. c. 66, s. 39.

therefore, now, besides their jurisdiction under sect. 5 of the Administration of Justice Act, 1920, which takes the place of the repealed sect. 6 of the Act of 1861, the same jurisdiction to deal with disputes arising on charterparties and bills of lading as is possessed by any judge of the King's Bench Division.

The limits of the jurisdiction of the High Court arise:—

- (I.) When the defendant is out of the jurisdiction; or
- (II.) When the amount in dispute and recovered is less than £100.

(I.) When the defendant is out of the jurisdiction (*i.e.* out of England and Wales), leave to serve a writ upon him out of the jurisdiction, thus subjecting him to the jurisdiction of the English Courts, can be obtained:—

(1.) When the action, being against a defendant not domiciled or resident in Scotland, is in respect of a contract, or its breach, which is (i) made within the jurisdiction, or (ii) made by an agent trading or residing within, on behalf of a principal trading or residing without, the jurisdiction, or (iii) by its terms, or by implication, to be governed by English law (*e*).

(2.) When the action is founded on any breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland (*e*).

Thus where freight is to be paid in England, or the goods delivered in England, a case for service under this rule would arise, but the contract must expressly or by implication require performance within the jurisdiction. Thus, in *Bell v. Antwerp Line* (*f*), a charterparty under which the charterers agreed to indemnify the shipowner against lighterage which would be incurred at Rio was

(*e*) Order XI. r. 1, sub-s. E. See *Comber v. Leyland*, (1898) A. C. 524.

(*f*) (1891) 1 Q. B. 103; *cf.* *The Eider*, (1891) P. 119; *Thompson v. Palmer*, (1893) 2 Q. B. 80.

held not to fall within this rule. It follows from the same case that it is not enough that part of the contract as to which no breach is alleged is to be performed within the jurisdiction; the breach complained of must be of a part of a contract to be performed within the jurisdiction.

(3.) When the action is founded on a tort committed within the jurisdiction (*ff*).

(4.) When any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction (*g*).

Thus, in *Massey v. Heynes* (*h*), where a foreigner disputed that he was bound by a charter made by an alleged agent of his in England, leave was given to serve him under this rule in an action against himself on the charter, or in the alternative against the agent for breach of warranty of authority. But in *Flower v. Rose* (*i*), a writ issued against a Scotch shipowner and a London broker to settle the amount of liability on a general average bond was not allowed to be served on the Scotch shipowner, on the ground that the broker was colourably joined and not a proper party to the action.

Where a proposed defendant is out of the jurisdiction, another remedy is furnished by the Administration of Justice Act, 1920 (*j*).

By sect. 5 of this Act the Admiralty Division of the High Court has jurisdiction on any claim—

(i) arising out of an agreement relating to the use or hire of a ship,

(ii) relating to the carriage of any goods in any ship,

(iii) in tort in respect of goods carried in any ship, provided that at the institution of the proceedings no owner or part owner of the ship is domiciled in England or Wales.

(*ff*) Order XI., r. 1, sub-s. E.E.

(*g*) Order XI. r. 1, sub-s. G.

(*h*) (1888), 21 Q. B. D. 330. See also the same procedure in *Bennetts v. McIlwraith*, (1896) 2 Q. B. 464.

(*i*) 7 T. L. R. 280; *cf.* also *Witted v. Galbraith*, (1893), 1 Q. B. 577.

(*j*) 10 & 11 Geo. V. c. 81, sect. 5.

This jurisdiction may be exercised either *in personam* or *in rem*.

(II.) The limitations on procedure in the High Court occasioned by the amount in dispute and recovered are as follows:—

(1.) If the plaintiff brings in the High Court an action founded ON CONTRACT, and recovers less than £40, he shall have no costs, if the action could have been commenced in the County Court. If he recovers more than £40, but less than £100, he shall not be entitled to any more costs than he would have obtained on such a judgment in the County Court (*k*).

(2.) If such an action is founded ON TORT, and the plaintiff recovers less than £10, he shall have no costs; if more than £10 but less than £50, he shall have only County Court costs (*k*).

But in either case the High Court may certify for costs on the High Court scale, or on some special County Court scale (*l*).

(3.) If, in the Admiralty Division, the plaintiff recovers less than £20 he will get no costs, and if he recovers less than £300 he will only recover County Court costs, unless in either case the judge certifies that there was sufficient reason for bringing the case in the High Court (*m*).

II. The COUNTY COURTS have jurisdiction of the following kinds:—

(I.) Common Law: —

(a.) Original:

(b.) Remitted.

(a.) *Original Jurisdiction*.—Where the debt or damage claimed does not exceed £100 (*n*). This may be increased by an agreement by the parties in writing (*o*).

(*k*) County Courts Act, 1919, sect. 11.

(*l*) See proviso to section last cited.

(*m*) Administration of Justice Act, 1920, s. 5 (1), Proviso (ii.).

(*n*) County Courts Act, 1888, s. 56, as amended by County Courts Act, 1903, s. 3.

(*o*) 1888 Act, s. 64. This jurisdiction is not ousted by the concurrent jurisdiction of the Court in Admiralty to the extent of £300: see *Reg.*

(b.) *Remitted*.—Actions of contract or tort and counterclaims where the amount claimed or remaining in dispute does not exceed £100, commenced in the High Court, may be remitted to the County Court (*p*).

(II.) *Admiralty Jurisdiction* as to charterparties and bills of lading rests on the Acts of 1868 and 1869 (*q*), which give County Courts having Admiralty Jurisdiction power to deal with the following causes:—

“Any claim for damage to cargo . . . in which the amount claimed does not exceed £300” (*r*).

“Any claim arising out of any agreement made in relation to the use or hire of any ship (*s*), or in relation to the carriage of goods in any ship (*t*), and any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed £300” (*r*).

The County Courts have jurisdiction in cases of charterparties and bills of lading, though the Court of Admiralty had no original jurisdiction in respect thereof (*x*).

Cases brought on the Common Law side of the County Courts can be commenced:—

v. Judge of Southend C. C. (1884), 13 Q. B. D. 142; *Scovell v. Bevan* (1887), 19 Q. B. D. 428.

(*p*) County Courts Act, 1919, s. 1.

(*q*) 31 & 32 Vict. c. 71, s. 3; 32 & 33 Vict. c. 51, s. 2. See *infra*, pp. 455, 456.

(*r*) The County Court has also jurisdiction in excess of £300 upon a claim of this nature, “when the parties agree by a memorandum signed by them or by their attorneys or agents” that it shall. See 31 & 32 Vict. c. 71, s. 3 (4), and 32 & 33 Vict. c. 51, s. 2 (2).

(*s*) This does not cover bottomry bonds: *The Elpis* (1872), L. R. 4 A. & E. 1; or Cardiff colliery guarantees: *The Zeus* (1888), 13 P. D. 188. It gave the County Court a wider jurisdiction as to charterparties than was enjoyed by the Admiralty Division of the High Court under the old Act of 1861: *The Montrosa*, (1917) P. 1; but the jurisdiction of the High Court is now assimilated to that of the County Court by the Act of 1920.

(*t*) A broker to whom by the terms of the charterparty commission on freight is payable by the shipowners cannot sue under this section: *The Nuova Raffaelina* (1871), L. R. 3 A. & E. 483.

(*x*) *Cargo ex Argos* (1872), L. R. 5 P. C. 134; *The Alina* (1880), 5 Ex. D. 227 (C. A.); *Reg. v. Judge of City of London Court*, (1892) 1 Q. B. 273 (C. A.); *Pugsley v. Ropkins*, (1892) 2 Q. B. 184 (C. A.). See also *The Montrosa*, (1917) P. 1.

(1.) In the Court within whose district the defendant resides or carries on business at the time of plaint (y).

(2.) By leave, either in the Court within whose district the cause of action wholly or partly arose, or in the Court in whose district the defendants or one of them dwelt or carried on business within six months before the issue of the plaint (y).

A remitted case on the Common Law side will be sent either to the Court in which it might have been commenced as above, or to any Court which is most convenient to the parties (z).

Cases on the Admiralty side may be commenced in such Courts as are provided by County Court rules to that effect (a).

The old limit of the right of appeal against decisions of the County Court in Admiralty to cases where more than £50 is recovered is repealed by s. 120 of the County Courts Act, 1888 (b).

(y) Act of 1888, s. 74.

(z) Sect. 1 of County Courts Act, 1919.

(a) Sect. 13 of County Courts Act, 1919, which repeals sect. 21 of County Courts Admiralty Jurisdiction Act, 1868.

(b) *The Eden*, (1892) P. 67

SECTION XIV

THE COMMERCIAL COURT.

THE judges of the Queen's Bench Division of the High Court of Justice on May 24, 1894, passed a series of resolutions as to the conduct of the business of the Queen's Bench Division, of which Resolution 14 was as follows:—

That it is desirable that a list should be made of commercial causes to be tried at the Royal Courts of Justice by a Judge alone, or by Jurors summoned from the City, and that a Commercial Court should be constituted of judges to be named by the judges of the Queen's Bench Division.

To carry out this resolution, in February, 1895, rules made by the judges of the Queen's Bench Division were published, and the late Mr. Justice (afterwards Lord Justice) Mathew, who together with the late Lord Russell of Killowen, Lord Chief Justice of England, and Mr. Justice Collins (afterwards Lord Collins of Kensington, a Lord of Appeal), were the first judges nominated as judges of the Commercial Court by the judges of the Queen's Bench Division, sat for the first time in the Commercial Court on March 1, 1895.

The rules above referred to were as follows:—

COMMERCIAL CAUSES.

Notice.

The judges of the Queen's Bench Division desire to make, in accordance with the existing rules and orders, further provision for the dispatch of commercial business as herein provided:—

1. Commercial causes include causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment,

insurance, banking, and mercantile agency and mercantile usages.

2. A separate list for summonses in commercial causes will be kept at chambers. A separate list will also be kept for the entry of such causes for trial, but no cause shall be entered in such list which has not been dealt with by a judge charged with commercial business, upon applications by either party for that purpose, or upon summons for directions or otherwise.

3. With respect to town commercial causes, it is considered desirable, with a view to dispatch and the saving of expense, that all applications shall be made direct to the judge charged with commercial business, and with respect to country commercial causes applications may, by consent of the parties, be made to him in like manner.

4. As to commercial causes already entered for trial, application may be made to such judge by either party to enter the same in the commercial cause list.

5. Applications in commercial causes under Order XIV. shall be made as heretofore, but where leave to defend has been given such causes may be dealt with like other commercial causes.

6. Application may be made to such judge under the provisions of the Judicature Act, 1894, and the rules thereunder, or by consent, to dispense with the technical rules of evidence, for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise.

7. Application may also be made to such judge, after writ or originating summons, for his judgment on any point of law.

8. Such judge may at any time after appearance, and without pleadings, make such order as he thinks fit for the speedy determination, in accordance with existing rules, of the questions really in controversy between the parties.

9. Parties may, if they so desire, agree that the judgment or decision of such judge in any case or matter shall be final.

10. Application may be made to such judge in urgent cases to fix an early day for the hearing of any cause or matter.

11. Summonses may be entered in the list of commercial summonses on and after Wednesday, the 20th day of February next; these will be heard by Mr. Justice Mathew, who, on Friday, the 1st day of March next, will sit, and thenceforward will, until further notice, and as far as is

practicable, continue to sit (*de die in diem*) for the dispatch of commercial business. Where necessary, other judges of the Queen's Bench Division will assist in the disposal of commercial business.

12. Country commercial causes will be tried, as is usual, at the assizes.

By order.

ORDER DATED 25TH JUNE, 1896.

Commercial Causes.

Great inconvenience has been caused in the arrangement of the Commercial List of cases, through parties who have had days fixed for trial not apprising the Court of the settlement or withdrawal of such cases. The result has been that other parties who would have been able to try their cases on those days have been unable to secure them, and days are thereby frequently wasted so far as the Commercial List is concerned.

The parties are required, therefore, in cases for which days have already been fixed, to give, where time will admit of it, notice to the clerk to the judge having charge of the Commercial List, seven days before the day fixed for the trial, that they will be prepared to try on such day; otherwise such cases will be struck out of the list.

Where time will not admit of seven days' notice, the earliest practicable notice must be given. As to cases in which days for trial shall hereafter be fixed, a like notice must be given (unless otherwise specially ordered), and on failure to give the required notice in any case, such case will be struck out of the list.

The procedure of the Commercial Court thus established does not depend on any hard and fast rules, but, while varying slightly according to the views of the particular judge taking the list at any time, runs on fairly well-defined lines, the object of the Court being to get the real question in dispute tried as soon as possible, with as few technicalities as to parties or evidence, and as few preliminary proceedings as possible. The first step is to apply for transfer of the case to the Commercial List. This application is usually made as the first head of claim in a summons, a form of which will be found below, asking for directions as to all interlocutory pro-

ceedings up to the trial of the action. All summonses in the Commercial Court are heard by the judge, questions of taxation only being referred to one particular master. The application for transfer may be made *ex parte* (a), but the other party can subsequently set aside the transfer, if the case is not a commercial one. The application is, however, only made *ex parte* if it is desired to make an urgent application immediately on issue of the writ, when the *ex parte* application can be made for transfer and for an interim injunction, or other urgent order. An appeal lies from an order to transfer (b). In cases where it is desired to serve a writ out of the jurisdiction in a commercial case, the practice is to issue an ordinary writ, apply for its transfer to the Commercial Court, and for leave to serve a concurrent writ or notice of writ, as the case may be, out of the jurisdiction. Any subsequent application by the defendant must then be made to the judge taking the Commercial List.

For a cause to be entered in the list it must be a "commercial cause." A definition of such a cause is attempted in rule 1; but the definition does not throw much light on the matter. The definition really depends on the views of the particular judge taking the list at the time. If the parties consent to the transfer, the judge does not closely scrutinise whether the case comes within any particular definition. In cases where the transfer is opposed, it becomes necessary to decide whether the cause is commercial. Speaking generally, cases relating to policies of insurance, charterparties and bills of lading, and banking, are always transferred. Cases relating to the Stock Exchange are transferred if they appear to involve substantial questions as to the rules and usages of the Stock Exchange, but not if they are mere debt-

(a) *Barrie v. Peruvian Corporation*, (1896) 1 Q. B. 208 (C. A.).

(b) *Sea Insurance Co. v. Carr*, (1901) 1 K. B. 7. The C. A. will not interfere with the discretion of the Judge in the Commercial Court who has refused to transfer a case to that list. *Hudson's Bay Co. v. Byrnes* (1920), 2 Ll. L. Rep. 192.

collecting actions and claims for differences. Cases relating to bills of exchange stand on somewhat the same footing; any case involving a real question under the law merchant is transferred, but mere debt-collecting actions on accommodation bills are not. Many company cases are transferred, especially those involving the construction of agreements for promotion, reconstruction, and similar matters; some, but not many cases of misrepresentations in prospectuses have been dealt with. Cases relating to the sale of goods, especially for shipment or import, are always taken, unless they appear to be mere debt-collecting actions, involving no point of commercial law or usage. Cases relating to the above matters may be transferred from the Chancery Division (c).

The power of the High Court (O. XXVI., rule 5) to give a judgment in the form of a declaration of right may sometimes be usefully invoked. A question whether the parties were bound by a contract, which if binding would continue in force for over a year, has been the subject of such a form of decision (d).

When a case is transferred, at the same time directions for its trial are usually given on the summons, a form of which is printed at the end of this chapter.

Points of Claim and Defence.—These are substituted for the Statement of Claim and Defence in the High Court Rules. They are intended to be shorter and less technical than pleadings, and to tell the opponent and the Court what the points to be raised are; they should, however, include particulars where particulars are necessary.

At first the practice of the Court was to make the

(c) *Baerlein v. Chartered Bank*, (1895) 2 Ch. 488.

(d) *Société Maritime v. Venus Co.* (1904), 9 Com. Cas. 289. See, however, *Glasgow Navigation Co. v. Iron Ore Co.*, (1910) App. Cas. 293, in which the House of Lords declined to answer a hypothetical conundrum. And see *Guaranty Co. v. Hamay*, (1915) 2 K. B. 536; *Stephenson v. Grant* (1917), 33 T. L. R. 174. An agreement to try a preliminary point ought to be embodied in an Order specifying the point to be tried. *Per Lord Sumner, Atlantic Co. v. Dreyfus*, (1922) 2 A. C. at p. 259.

delivery of points of claim and defence simultaneous. Now seven days is usually allowed for points of claim, and seven days following their delivery for points of defence, but these times are sometimes shortened.

Interrogatories are rarely allowed, and then only few and short ones. Their chief justification is to avoid a commission, for which object the Commercial Judge will permit a great deal. The information asked for by interrogatories is frequently ordered to be given by way of particulars.

Lists of Documents.—These take the place of the old affidavits of documents; they are not sworn to, and the £5 fee is not required. The judges expect solicitors and counsel practising before them to see that the lists of documents, though not on oath, are complete, and any case of non-disclosure of a material document seriously prejudices the case of the party failing to disclose it.

Mode of Trial.—It is not uncommon to order preliminary questions of law or construction, which if decided one way may put an end to the litigation, to be tried at once (*e*). The Court of Appeal has, however, intimated that where such an order is made, the trial of the main question must be postponed till the appeal, if any, is disposed of (*f*).

Most of the cases tried in the Commercial Court are tried without a jury; but if a jury is desired it is usually granted in a suitable case (*g*); a condition has sometimes been imposed that if the jury disagree, the matter shall be decided by the judge.

(*e*) The abortive result, after arrival in the House of Lords, of an attempt to adopt this course in *Norfolk, &c. Co. v. Virginia Carolina Co.* (1913) A. C. 52, may well cause hesitation in the future. See also *Western S.S. Co. v. Amaral*, (1914) 3 K. B. 55.

(*f*) *The Maori King*, (1895) 2 Q. B. at p. 556. Such appeals are put by the C. A. in the final list of appeals, though interlocutory notice may have to be given.

(*g*) Jury cases in the Commercial Court are now tried by City of London Juries. And *per contra* where trial of a case by a City of London Jury has been ordered in K. B. chambers there should be a formal application for transfer to the Commercial List and subsequent interlocutory applications be made to the judge in charge of that list. *Barnes v. Lawson* (1911), 16 Com. Cas. 74.

Evidence.—The only powers of the Court in the absence of consent are not peculiar to it, but are derived from Order XXX., rule 7, of the rules of the High Court, viz.:—"On the hearing of the summons" (for directions) "the Court or a judge may order that evidence of any particular fact to be specified in the order shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the Court or judge may direct": and from that part of Order XXXVII., rule 1, which directs that "a judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable." These rules, of course, apply to all divisions of the High Court, but are not habitually acted upon except in the Commercial Court. In practice logs, protests, and average statements, are constantly used as evidence of the facts stated therein: the evidence of foreign witnesses is received by sworn declarations or affidavit, usually communicated to the other side before an order is made for their admission as evidence, and commissions are very rarely granted, except on terms that their costs are reserved to the judge at the trial, and with the prospect of the party whose objection has rendered them necessary having to pay the costs thereof in any event.

Time of Trial.—The judge sometimes fixes a day for the trial on the hearing of the summons to transfer. In this case the practical inconvenience arises that the case cannot be entered for trial in the Associate's List until the pleadings, or the points corresponding thereto, are closed, and a fee paid. The Judge's List and the Associate's List are therefore widely dissimilar. Where cases stand 1, 2, 3 for May 1, in the Judge's List, the Associate's List may show only 3 entered, which will take precedence of 1 and 2 accordingly. The remedy

appears to be to treat the Judge's List as the Associate's List, to require the fee to be paid when the order fixing the day is drawn up, to allow subsequent deposit of pleadings with the Associate, and to make it the duty of the solicitors in the cause to communicate settlement of case forthwith to the Court, allowing a suitable fee on taxation.

The judges who, up to the end of the year 1922, have sat in the Commercial Court, are as follows:—Lord Russell of Killowen, L.C.J.; Mathew, J.; Collins, J.; Kennedy, J.; Bigham, J.; Walton, J.; Channell, J.; Bray, J.; Pickford, J.; Hamilton, J.; Scrutton, J.; Bailhache, J.; Rowlatt, J.; Atkin, J.; Sankey, J.; Roche, J.; McCardie, J.; Greer, J.; and (for a short time, though not on the rota (*h*)) Bruce, J., and Phillimore, J. The proceedings of the Court are generally quicker than those of the ordinary lists of the King's Bench Division, actions being sometimes disposed of in less than a month from writ issued, and, it is believed, are considerably cheaper, and more satisfactory to commercial men.

FORM OF COMMERCIAL SUMMONS.

Let all parties attend (*formal parts*) on the hearing of an application:—

That the action be transferred to the Commercial List.

That points of claim be delivered by the plaintiffs in — days.

That points of defence be delivered by the defendants in — days afterwards.

That lists of documents be exchanged between the parties in — days (*i*).

That the action be tried with [or without] a jury on —.

That the costs of this application be costs in the cause.

(*h*) The rota of judges to sit in the Court existed in its earlier days. It seems now to have disappeared, and all the judges of the K. B. D. are available.

(*i*) The order in this form means what it says, *i.e.*, in — days from the date of the order, and not after delivery of the Points of Defence. Sometimes the order is expressly made in the form "in — days after delivery of points of defence."

APPENDIX I.

IN the first five editions of this work there were printed certain typical forms of charterparties and bills of lading, although it was not thought necessary or desirable to print a large and indiscriminate collection.

Owing to the increase in the number of problems considered and cases decided by the Courts, this work has grown in bulk with each edition (a). Since the fifth edition, in order to prevent that bulk becoming unwieldy, it has been thought desirable to omit the forms previously printed in this appendix.

The forms of bills of lading in use by regular lines, and also forms of well-recognised charterparties, can be procured at the stationers' shops in the City or in other shipping localities, especially in the neighbourhood of such places as the Baltic (b).

The earliest bill of lading of which a copy survives appears to be one dated 1538. It reads as follows:—

This bylle Indented made the xxij^{ti} daye of October in the xxx^{ti} yere of our Sovereigne lord Kyng Henry the viiith Wytnessith that I Robert Man servaunt to Syr Oswald Wylstrop Kyght hath delyvered to John Halmdry merchaunt of the Newe Castell and layd in his shyp called the Thomas of the Newe Castell xxvj^{ti} weye salt of the measure of Blythe to carye to London to Dyce Key as shortly as wynde and wether wyll

(a) The first edition published in 1886 contained 325 pages and references to about 1000 cases. The present edition contains references to about 1940 cases.

(b) This has existed for some time. "Bills of lading are commonly to be had in print in all places and several languages." (Malynes, *Lex Mercatoria* (3rd. ed. 1686), p. 97.) An advertisement in that work, "A Catalogue of Books, etc. Sold by Robert Horne at the South Entrance of the Royal Exchange, London," includes "Bills of Lading in *French, Dutch, Spanish, Italian and English*." The vast majority of charterparties and bills of lading throughout the world are now expressed in English.

sarve after daye above-named and ther to delyver the sayd salt to my master his assigney or lawful attorney Also the sayd John Halmdry shalbe dyscharged and his shyp of the sayd salt after that he come to London to Dyce Key within vj lawfull workyng dayes and ther to be payde his freight and condycōn for caryeing of the sayd salt whiche is vj^s viij^d the weye for xxvj^{ti} wey takyng yn at the salt pannes of Blythe the daye above named Also the master of the shyp called Thomas Gybson shall have a payre of hosse clothe to doo hys dyligence and hast the sayd voyage towards London And in wytnesse of truth and these premysses above-named to be fferme and stable We the seyde John Halmdry and Robert Manne hath wrytten our names with our owne handes the daye above named before Myghell Bynkes of Yorke and other mor.

(Selden Society, Select Pleas in the Court of Admiralty, Vol. I., p. 61.)

APPENDIX II.

IN the first eight editions of this work there was printed in this Appendix an account of the customs, and methods of loading and discharging, in the ports of London, Liverpool, Bristol, Glasgow and Hull. Owing to the disturbing effects of the War conditions in all ports have been so affected, and are likely to be so subject to variation, that any attempt to give such an account must at present be lacking in precision, and in value. For this reason, and also from a desire to check the increasing bulk of the volume, it has been decided to omit the contents of this Appendix in the present edition. It may, however, be useful to give the following references to the principal cases in which the customs of these ports have been discussed.

LONDON.

- Petrocochino v. Bott* (1874), L. R. 9 C. P. 355.
The Clan Macdonald (1883), 8 P. D. 178.
Aste v. Stumore (1884), 1 C. & E. 319.
Marzetti v. Smith (1884), 49 L. T. 580.
Pollitzer v. S.S. Cascapedia (1886), 2 T. L. R. 413.
Major and Field v. Grant (1902), 7 Com. Cas. 231.
Grange v. Taylor (1904), 9 Com. Cas. 223.
Glasgow Navigation Co. v. Howard (1910), 15 Com. Cas. 88.

LIVERPOOL.

- The Emilien Marie* (1875), 44 L. J. Adm. 9.
Liebig's Meat Co. v. Mersey Docks, (1918) 2 K. B. 381.

BRISTOL.

- Sea S.S. Co. v. Price Walker* (1903), 8 Com. Cas. 292 (Sharpness).
Ropner & Co. v. Stote Hosegood (1905), 10 Com. Cas. 73 (Bristol).
 See also *Robert Dollar Co. v. Blood Holman & Co.* (1920), 4 Ll. L. Rep. 343 (Sharpness).

HULL.

- Aktieselskabet Hekla v. Bryson* (1908), 14 Com. Cas. 1, overruled by *Van Liewen v. Hollis* (1920), A. C. 239.
P. & O. Co. v. Leetham (1915), 32 T. L. R. 130.

APPENDIX III.

The principal Statutes affecting the Contract of Affreightment.

18 & 19 Vict. c. 111 (1855).—BILLS OF LADING ACT.

WHEREAS, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner: and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:—

1. Every consignee of goods named in a bill of lading (a), and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself (b).

2. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. Every bill of lading (a) in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other persons signing the

(a) There is no definition of a "bill of lading" in this Act. A bill of lading beginning "Received for shipment by the —" instead of "Shipped on the —" was held to be a bill of lading within sect. 6 of the Admiralty Jurisdiction Act, 1861. *The Marlborough Hill*, (1921) 1 A. C. 444. There seems little doubt that it is a "bill of lading" within the meaning of this Act, but see McCardie, J., in *Diamond Co. v. Bourgeois*, (1921) 3 K. B. 443.

(b) See Articles 56-59, 75, *ante*.

same, notwithstanding that such goods or some part thereof may not have been so shipped (c), unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master, or other person so signing, may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims (d).

31 & 32 Vict. c. 71 (1868).—COUNTY COURTS ADMIRALTY JURISDICTION ACT.

3. Any County Court having Admiralty jurisdiction (e) shall have jurisdiction (f), and all powers and authorities relating thereto, to try and determine subject and according to the provisions of this Act the following causes . . .

(3.) As to any claim (g) for damage to cargo . . . any cause in which the amount claimed does not exceed £300 (h).

32 & 33 Vict. c. 51 (1869).—COUNTY COURTS ADMIRALTY JURISDICTION AMENDMENT ACT.

2. Any County Court appointed or to be appointed to have Admiralty jurisdiction (e) shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:

(1.) As to any claim (g) arising out of any agreement made in

(c) This does not make the bill of lading conclusive evidence as to marks on the goods which do not affect their nature, quality, or commercial value: *Parsons v. New Zealand S.S. Co.*, (1901) 1 Q. B. 548.

(d) See Article 21, *ante*.

(e) The ordinary County Court jurisdiction to try actions on contracts, such as charterparties or bills of lading, where the damages are less than £100, is not ousted by these sections: *Reg. v. Judge of Southend County Court* (1884), 13 Q. B. D. 142; *cf. Scovell v. Bevan* (1887), 19 Q. B. D. 428. The County Court Act, 1903 (sect. 3), increased the old limit of £50 to £100.

(f) Either *in rem* or *in personam*. See sect. 3 of the Amendment Act, 1869, *infra*.

(g) The County Court has jurisdiction under this Act, though the Admiralty Division would have no such jurisdiction: *The Alina* (1880) (C. A.), 5 Ex. D. 227; following *The Argos* (1872), L. R. 5 P. C. 134; and though the owner of the ship is domiciled in England, so as to exclude the operation of the Admiralty Court Act, 1861, or sect. 5 of the Administration of Justice Act, 1920, which now takes its place: *The Rona* (1882), 7 P. D. 247. See also *The Montrosa*, (1917) P. 1.

(h) In cases where the amount involved is over £300, jurisdiction may be given to a County Court by consent of the parties in writing. (Sub-sect. 4 of sect. 3, of Act of 1868; sub-sect. 2 of sect. 2, of Act of 1869.)

relation to the use or hire of any ship (l), or in relation to the carriage of goods in any ship (m), and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed £300 (n).

3. The jurisdiction conferred by this Act, and by the County Courts Admiralty Jurisdiction Act, 1868, may be exercised either by proceedings *in rem* or by proceedings *in personam*.

[Other sections of these Acts set out the County Court procedure, and provide for transfer to the Admiralty Division.]

10 & 11 Geo. 5. c. 81 (1920).—ADMINISTRATION OF JUSTICE ACT, 1920.

5.—(1.) The Admiralty jurisdiction of the High Court shall, subject to the provisions of this section, extend to—

- (a.) any claim arising out of an agreement relating to the use or hire of a ship; and
- (b.) any claim relating to the carriage of goods in any ship; and
- (c.) any claim in tort in respect of goods carried in any ship:

Provided that—

- (i.) this section shall not apply in any case in which it is shown to the Court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England or Wales; and
- (ii.) if in any proceedings under this section the plaintiff recovers a less amount than twenty pounds, he shall not be entitled to any costs of the proceedings, or, if in such proceedings the plaintiff recovers a less amount than three hundred pounds, he shall not be entitled to any more costs than those to which he would have been entitled if the proceedings had been brought in a county court, unless in either case the Court or a judge certifies that there was sufficient reason for bringing the proceedings in the High Court.

(2.) The jurisdiction conferred by this section may be exercised either in proceedings *in rem* or in proceedings *in personam* (o).

(l) *Per Day, J.*, in *R. v. Southend* (1884), 13 Q. B. D. 142, this clause applies to charterparties. It does not apply to the colliery guarantees usual at Cardiff (*The Zeus* (1888), 13 P. D. 188), nor to bottomry bonds (*The Elpis* (1872), L. R. 4 A. & E. 1).

(m) *Per Day, J.* (see note (l)), this clause applies to bills of lading. "Goods" do not include passenger's luggage: *Reg. v. Judge of City of London Court* (1883), 12 Q. B. D. 115.

(n) See note (h), p. 455, and p. 439, *supra*.

(o) Proceedings *in personam* under this Act must still be subject to the R. S. C. Order 11 as to service of a writ out of the jurisdiction, *i.e.* there is nothing to be gained as regards such proceedings in the Admiralty Division that cannot be had in the King's Bench Division. But if the ship be in an English port the proceedings *in rem* may be possible, where none *in personam* can be had.

54 & 55 Vict. c. 39.—STAMP ACT, 1891, ss. 15, 40, 49—51.

Stamps on Charterparties and bills of lading (p).

15.—(1.) Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(3.) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(a.) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(b.) The Commissioners may, if they think fit, at any time within three months after the first execution of any instrument mitigate or remit any penalty payable on stamping.

(4.) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

40.—(1.) A bill of lading is not to be stamped after the execution thereof (q).

(2.) Every person who makes or executes any bill of lading not duly stamped shall incur a fine of fifty pounds.

49.—(1.) For the purposes of this Act the expression “charterparty” includes any agreement or contract for the charter of any ship or vessel or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person for or relating to the freight or conveyance of any money, goods, or effects on board of the ship or vessel.

(2.) The duty upon a charterparty may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.

50. Where a charterparty is first executed out of the United Kingdom without being duly stamped, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the

(p) See Article 1, *supra*.

(q) As the schedule to the Act only imposes stamp duty on a bill of lading for any goods “to be exported or carried coastwise,” it follows that no bill of lading issued for goods shipped in ports abroad need ever be stamped at all.

duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument when so stamped shall be deemed duly stamped.

51. A charterparty may be stamped with an impressed stamp after execution upon the following terms; that is to say,

(1.) Within seven days after the first execution thereof, on payment of the duty and a penalty of four shillings and sixpence;

(2.) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Schedule.

| | |
|--|------------------|
| BILL OF LADING of or for any goods, merchandise or effects to be exported or carried coastwise | <i>Sixpence.</i> |
| CHARTERPARTY | <i>Sixpence.</i> |

52 & 53 Vict. c. 45, s. 10.—FACTORS ACT, 1889 (*r*).

10. Where a document of title to goods has been lawfully transferred to any person as a buyer or owner of the goods, and that person transfers the document to a person who takes the same in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

56 & 57 Vict. c. 71, ss. 19, 25, 38—48, 62 (parts).—SALE OF GOODS ACT, 1893.

19. (*s*)—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier, or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not

(*r*) See Article 67, note, *supra*.

(*s*) Article 60.

honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

25. (t)—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term “mercantile agent” has the same meaning as in the Factors Acts.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS (u).

38.—(1.) The seller of the goods is deemed to be an “unpaid seller” within the meaning of this Act—

- (a.) When the whole of the price has not been paid or tendered;
- (b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2.) In this part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for the price.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c.) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arresting or pouncing; and such arrestment or pouncing shall have the same operation and effect in a competition or otherwise as an arrestment or pouncing by a third party.

Unpaid Seller's Lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention, on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon—

(a.) When he delivers the goods to a carrier, or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in

transitu, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to shew an agreement to give up possession of the whole of the goods.

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

47. (v) Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

62.—(1.) In this Act, unless the context or subject-matter otherwise requires—

* * * * *

“Bailee” in Scotland includes custodier:

“Buyer” means a person who buys or agrees to buy goods:

“Contract of sale” includes an agreement to sell as well as a sale:

* * * * *

“Delivery” means voluntary transfer of possession from one person to another:

“Document of title to goods” has the same meaning as it has in the Factors Acts:

“Factors Acts” mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

* * * * *

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

"Lien" in Scotland, includes right of retention :

* * * * *

"Property" means the general property in goods, and not merely a special property:

* * * * *

"Sale" includes a bargain and sale as well as a sale and delivery:

"Seller" means a person who sells or agrees to sell goods.

* * * * *

(2.) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not (x).

57 & 58 Vict. c. 60.—MERCHANT SHIPPING ACT, 1894.

Mortgages (y).

31.—(1.) A registered (z) ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book.

(2.) Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the day and the hour of that record.

32. Where a registered mortgage is discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money endorsed thereon, duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged, and on that entry being made the estate (if

(x) Article 65.

(y) Article 17 (c).

(z) Registration is dealt with in sects. 2 *seq.* of the Act. The earliest provision for a Register of English ships was in 1660, by 12 Car. II, c. 18, s. 10.

any) which passed to the mortgagee shall vest in the person in whom (having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made.

33. If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself.

34. Except as far as may be necessary for making a mortgaged ship or share available as security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

35. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money: but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a court of competent jurisdiction, sell the ship or share, without the concurrence of every prior mortgagee.

36. A registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the commencement of his bankruptcy had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim or interest therein, of the other creditors of the bankrupt or any trustee or assignee on their behalf.

37. A registered mortgage of a ship or share may be transferred to any person, and the instrument effecting the transfer shall be in the form marked C in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument, the registrar shall record it by entering in the register book the name of the transferee as mortgagee of the ship or share, and shall by memorandum under his hand notify on the instrument of transfer that it has been recorded by him, stating the day and hour of the record.

33.—(1.) Where the interest of a mortgagee in a ship or share is transmitted on marriage, death, or bankruptcy, or by any lawful means, other than by a transfer under this Act, the transmission shall be authenticated by a declaration of the person to whom the interest is transmitted, containing a statement of the manner in which and the person to whom the property has been transmitted and shall be accompanied by the like evidence as is by this Act required in case of a corresponding transmission of the ownership of a ship or share.

(2.) The registrar, on the receipt of the declaration, and the production of the evidence aforesaid, shall enter the name of the person entitled under the transmission in the register book as mortgagee of the ship or share.

Managing Owner (a).

59.—(1.) The name and address of the managing owner for the time being of every ship registered at a port in the United Kingdom shall be registered at the custom house of that port.

(2.) Where there is not a managing owner there shall be so registered the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner, and any person whose name is so registered shall, for the purposes of this Act, be under the same obligations, and subject to the same liabilities, as if he were the managing owner.

(3.) If default is made in complying with this section the owner shall be liable, or if there are more owners than one, each owner shall be liable in proportion to his interest in the ship, to a fine not exceeding in the whole one hundred pounds each time the ship leaves any port in the United Kingdom.

Dangerous Goods (b).

446.—(1.) A person shall not send or attempt to send by any vessel, British or foreign, and a person not being the master or owner of the vessel, shall not carry or attempt to carry in any such vessel, any dangerous goods, without distinctly marking their nature on the outside of the package containing the same, and giving written notice of the nature of those goods and of the name and address of the sender or carrier thereof to the master or owner of the vessel at or before the time of sending the same to be shipped or taking the same on board the vessel.

(2.) If any person fails without reasonable cause to comply with this section, he shall for each offence be liable to a fine not exceeding one hundred pounds; or if he shows that he was merely an agent in the shipment of any such goods as aforesaid, and was not aware and did not suspect and had no reason to suspect that the goods shipped by him were of a dangerous nature, then not exceeding ten pounds.

(3.) For the purpose of this Part of this Act the expression "dangerous goods" means aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, any explosives within the meaning of the Explosives Act, 1875, and any other goods which are of a dangerous nature.

447. A person shall not knowingly send or attempt to send by, or carry or attempt to carry in, any vessel, British or foreign, any dangerous goods under a false description, and shall not falsely describe the sender or carrier thereof, and if he acts in contravention of this section he shall for each offence be liable to a fine not exceeding five hundred pounds.

448.—(1.) The master or owner of any vessel, British or foreign, may refuse to take on board any package or parcel which he suspects to contain any dangerous goods, and may require it to be opened to ascertain the fact.

(2.) Where any dangerous goods, or any goods, which, in the judgment of the master or owner of the vessel, are dangerous goods, have been sent or brought aboard any vessel, British or foreign, without being marked as aforesaid, or without such notice having been given as aforesaid, the master or owner of the vessel may cause those goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master nor the owner of the vessel shall be subject to any liability, civil or criminal, in any court for so throwing the goods overboard.

449.—(1.) Where any dangerous goods have been sent or carried, or attempted to be sent or carried, on board any vessel, British or foreign, without being marked as aforesaid, or without such notice having been given as aforesaid, or under a false description, or with a false description of the sender or carrier thereof, any court having Admiralty jurisdiction may declare those goods, and any package or receptacle in which they are contained, to be, and they shall thereupon be, forfeited, and when forfeited shall be disposed of as the court direct.

(2.) The Court shall have, and may exercise, the aforesaid powers of forfeiture and disposal, notwithstanding that the owner of the goods has not committed any offence under the provisions of the Act relating to dangerous goods, and is not before the court, and has not notice of the proceedings, and notwithstanding that there is no evidence to show to whom the goods belong; nevertheless the court may, in their discretion, require such notice as they may direct to be given to the owner or shipper of the goods before they are forfeited.

450. The provisions of this Part of this Act relating to the carriage of dangerous goods shall be deemed to be in addition to and not in substitution for, or in restraint of, any other enactment for the like object, so nevertheless that nothing in the said provisions shall be deemed to authorise any person to be sued or prosecuted twice in the same matter.

PART VII.

DELIVERY OF GOODS (c).

Delivery of Goods and Lien for Freight.

492. In this Part of this Act unless the context otherwise requires—

The expression “goods” includes every description of wares and merchandise:

The expression “wharf” includes all wharves, quays, docks, and premises in or upon which any goods, when landed from ships, may be lawfully placed:

The expression "warehouse" includes all warehouses, buildings, and premises in which goods, when landed from ships, may be lawfully placed:

The expression "report" means the report required by the customs laws to be made by the master of an importing ship:

The expression "entry" means the entry required by the customs laws to be made for the landing or discharge of goods from an importing ship:

The expression "shipowner" includes the master of the ship and every other person authorised to act as agent for the owner or entitled to receive the freight, demurrage, or other charges payable in respect of the ship:

The expression "owner" used in relation to goods means every person who is for the time entitled, either as owner or agent for the owner, to the possession of the goods, subject, in the case of a lien (if any), to that lien:

The expression "wharfinger" means the occupier of a wharf as hereinbefore defined:

The expression "warehouseman" means the occupier of a warehouse as hereinbefore defined:

493.—(1.) Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may (d) make entry of and land or unship the goods at the following times—

(a.) If a time for the delivery of the goods is expressed in the charterparty, bill of lading, or agreement, then at any time after the time so expressed (e):

(b.) If no time for the delivery of the goods is expressed in the charterparty, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship.

(2.) Where a shipowner lands goods in pursuance of this section he shall place them, or cause them to be placed—

(a.) If any wharf or warehouse is named in the charterparty, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed and if

(d) If the shipowner lands the goods pursuant to power given him by the bill of lading (equivalent to the power here given him by statute) and in doing so he does not purport to act under this section, or to give a notice to the warehouseman under sect. 494, the goods-owner cannot claim to take advantage of sects. 495 and 496 so as to have his goods released on paying the freight to the warehouseman instead of to the shipowner: *Dennis v. Cork S.S. Co.*, (1913) 2 K. B. 393.

(e) Whether a shipowner in order to avail himself of his rights under sect. 494 must land the goods at the time here specified is doubtful. See *Smailes v. Hans Dessen* (1905), 11 Com. Cas. 74; 12 Com. Cas. 117.

they can be conveniently there received, on that wharf or in that warehouse; and

- (b.) In any other case on ~~some~~ wharf or in some warehouse on or in which goods of a like nature are usually placed: the wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the Commissioners of Customs for the landing of dutiable goods.

(3.) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed to do so, and his entry shall in that case be preferred to any entry which may have been made by the shipowner.

(4.) If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of that landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, the goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on that landing and assortment shall be borne by the shipowner.

(5.) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make that delivery, and has also failed at the time of that offer to give the owner of the goods correct information of the time at which the goods can be delivered, then the shipowner shall, before landing or unshipping the goods, in pursuance of this section, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without that notice, do so at his own risk and expense.

494. If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him (f).

(f) *Quære* whether goods landed under this section must be landed within the terms of sect. 493. See note (e) to that section.

495. The said lien for freight and other charges shall be discharged (g)—

- (1.) Upon the production to the wharfinger or warehouseman of a receipt for the amount claimed as due, and delivery to the wharfinger or warehouseman of a copy thereof or of a release of freight from the shipowner, and
- (2.) Upon the deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal in amount to the sum claimed as aforesaid by the shipowner (h);

but in the latter case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

496.—(1.) When a deposit as aforesaid is made with the wharfinger or warehouseman, the person making the same may (g), within fifteen days after making it, give to the wharfinger or warehouseman notice in writing to retain it, stating in the notice the sums, if any, which he admits to be payable to the shipowner, or as the case may be, that he does not admit any sum to be so payable, but if no such notice is given, the wharfinger or warehouseman may at the expiration of the fifteen days, pay the sum deposited over to the shipowner.

(2.) If a notice is given as aforesaid the wharfinger or warehouseman shall immediately apprise the shipowner of it, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by the notice to be payable, and shall retain the balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the notice.

(3.) At the expiration of those thirty days unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods (i) to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight or other charges as aforesaid, and notice in writing of those proceedings has been served on the wharfinger or warehouseman, the wharfinger or warehouseman shall pay the balance or sum to the owner of the goods (h).

(4.) A wharfinger or warehouseman shall by any payment under this section be discharged from all liability in respect thereof.

(g) See footnote (d) on p. 467.

(h) Where a shipowner claims freight to which he is not entitled, and under these provisions the cargo-owner deposits money with the wharfinger or warehouseman with a notice that he does not admit it to be due to the shipowner, and the Court subsequently decides that it is not due, the cargo-owner is entitled to recover from the shipowner interest by way of damages upon the sum deposited for the period of its deposit: *Red "R" S.S. Co. v. Allatini* (1909), 14 Com. Cas. 92.

(i) "Owner of the goods" here means the owner at the time when the payment was in fact made to the wharfinger. *Greer, J., Aktieselskab Helsingors v. Walton*, (1921) 9 Ll. L. R. 105.

497.—(1.) If the lien is not discharged, and no deposit is made as aforesaid, the wharfinger or warehouseman may, and, if required by the shipowner, shall, at the expiration of ninety days from the time when the goods were placed in his custody, or, if the goods are of a perishable nature, at such earlier period as in his discretion he thinks fit, sell by public auction, either for home use or for exportation, the goods or so much thereof as may be necessary to satisfy the charges hereinafter mentioned.

(2.) Before making the sale the wharfinger or warehouseman shall give notice thereof by advertisement in two local newspapers circulating in the neighbourhood, or in one daily newspaper published in London, and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharfinger or warehouseman, or is otherwise known to him, send notice of the sale to the owner of the goods by post.

(3.) The title of a *bonâ fide* purchaser of the goods shall not be invalidated by reason of the omission to send the notice required by this section, nor shall any such purchaser be bound to inquire whether the notice has been sent.

498. The proceeds of sale shall be applied by the wharfinger or warehouseman as follows, and in the following order:—

- (i.) First, if the goods are sold for home use, in payment of any customs or excise duties owing in respect thereof; then
- (ii.) In payment of the expenses of the sale; then
- (iii.) In payment of the charges of the wharfinger or warehouseman and the shipowner according to such priority as may be determined by the terms of the agreement (if any) in that behalf between them; or, if there is no such agreement:—
 - (a.) in payment of the rent, rates, and other charges due to the wharfinger or warehouseman in respect of the said goods; and then
 - (b.) in payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods;

and the surplus, if any, shall be paid to the owner of the goods.

499. Whenever any goods are placed in the custody of a wharfinger or warehouseman, under the authority of this Part of the Act, the wharfinger or warehouseman shall be entitled to rent in respect of the same, and shall also have power, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the wharfinger or warehouseman are necessary for the proper custody and preservation of the goods, and shall have a lien on the goods for the rent and expenses.

500. Nothing in this Part of the Act shall compel any wharfinger or warehouseman to take charge of any goods which he would not have been liable to take charge of if this Act had not,

been passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Part of this Act.

501. Nothing in this Part of this Act shall take away or abridge any powers given by any local Act to any harbour authority, body corporate, or persons, whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods; nor shall anything in this Part of this Act take away or diminish any rights or remedies given to any shipowner or wharfinger or warehouseman by any local Act (k).

PART VIII.

LIABILITY OF SHIPOWNERS (l).

502. The owner (m) of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity (n) in the following cases, namely:—

- (i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire (o) on board the ship (p); or

(k) Sects. CXCIII to CXCIX of the Mersey Docks Consolidation Act, 1858, contain provisions as to warehousing goods under claims for freight very much to the effect of this part of the Merchant Shipping Act, 1894. The sections are printed in Lowndes on General Average (6th ed., 1912), at p. 841.

(l) A shipowner by his contract of carriage may contract himself out of the immunity from, or limitation of liability provided by these sections: *The Satanita*, (1897) A. C. 59; *Virginia v. Norfolk, &c. Co.*, (1912) 1 K. B. 229.

(m) See footnote (x) on p. 472 as to railway companies and charterers.

(n) As to "actual fault or privity," see *Wahlberg v. Young* (1876), 45 L. J. C. P. 783; *The Warkworth* (1884), 9 P. D. 145; *The Diamond*, (1906) P. 282; *Lennard's Co. v. Asiatic Co.*, (1915) A. C. 705. That the owner is on board the vessel is not by itself enough to constitute "fault or privity": *The Obey* (1866), L. R. 1 A. & E. 102. If the "owner" is a corporation the "fault or privity" must be that of the person, or persons, who is, or are, "really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation" (*per* Haldane, L.C., *Lennard's Co. v. Asiatic Co.*, (1915) A. C. at p. 713): e.g., of the managing director: *Lennard's Co. v. Asiatic Co.*, *ubi supra*; or the board of directors: *Smitton v. Orient Co.*, (1907) 12 Com. Cas. 270; *cf. The Yarmouth*, (1909) P. 293. The onus of disproving "actual fault or privity" is on the shipowner: *Lennard's Co. v. Asiatic Co.*, *ubi supra*.

(o) See Article 87, *supra*, p. 262. This includes damage by smoke, and by water used to put out a fire: *The Diamond* (*ubi supra*).

(p) This does not free the shipowner from liability for general average contribution for damage caused by water used to extinguish fire: *Schmidt v. Royal Mail S.S. Co.* (1876), 45 L. J. Q. B. 646, approved, *Greenshields v. Stephens*, (1908) 1 K. B. 51 (C. A.); (1908) App. Cas. 431. Nor can the shipowner rely upon it if goods received by him for shipment are burnt in a lighter alongside: *Morewood v. Pollok* (1853),

- (ii.) where any gold, silver, diamonds, watches (*q*), jewels, or precious stones taken in or put on board his ship (*r*), the true nature and value (*s*), of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof (*t*).

503. (*u*)—(1.) The owners (*x*) of a ship, British or foreign, shall not where all or any of the following occurrences take place without their actual fault or privity (*y*); (that is to say),

- (a.) Where any loss of life or personal injury is caused to any person being carried in the ship;
- (b.) Where any damage or loss is caused to any goods, merchandise or other things whatsoever (*z*), on board the ship;
- (c.) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

1 E. & B. 743. The equivalent of this provision as to fire on board was first enacted by the statute 26 Geo. 3, c. 86. It was prompted by the decision in 1785 of *Forward v. Pittard*, 1 T. R. 27.

(*q*) A jury found that "watch movements" were not "watches" within this section.

(*r*) Personal effects of a passenger on a ship, if of the specified character, are within this provision: *Smitton v. Orient Co.* (*ubi supra*).

(*s*) *Cf. Williams v. African S.S. Co.* (1856), 1 H. & N. 300; where a description, "248 ounces of gold dust," was held bad, as not stating value; and *Gibbs v. Potter* (1842), 10 M. & W. 70, where the description "1338 hard dollars" was held good.

(*t*) The equivalent of this provision as to jewellery, etc., was first enacted in 1734 by the statute 7 Geo. 2, c. 15. The qualification "without the Privity and Knowledge of such Owner or Owners," occurs in that Act. The limit of liability provided was the value of the ship with all her appurtenances, and the full amount of freight due or to grow due for the voyage.

(*u*) This section is amended by sect. 1 of the Merchant Shipping (Liability, etc.) Act, 1900, printed *infra*.

(*x*) By sect. 71 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), it is provided that "owners" in this section is to include "any charterer to whom the ship is demised." In *The Steam Hopper*, No. 66, (1908) App. Cas. 126 (a case that began before the amending Act was passed), the House of Lords held that "owners" in the above sect. 503 did include a charterer by demise, so that the amendment by the Act of 1906 was unnecessary. A railway company chartering a ship will apparently get the advantage of this section and of sect. 502, whether they are charterers by demise or not: see sect. 12 of the Regulation of Railways Act, 1871. An ordinary charterer, who has contracted personally by a bill of lading for the carriage of goods (as in *The Okehampton*, (1913) P. 173), will apparently not get the benefit of sect. 502 or of sect. 503 unless he is a charterer by demise.

(*y*) See note (*n*), p. 471, *ante*.

(*z*) Which includes passengers' luggage: *The Stella*, (1900) P. 161.

(d.) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship ;
 be liable to damages beyond the following amounts (a); (that is to say),

- (i.) in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage (b); and
- (ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage (c).

(2.) For the purposes of this section—

- (a.) The tonnage (d) of a steamship shall be her *gross tonnage without deduction on account of engine room* (e); and the tonnage of a sailing ship shall be her registered tonnage;

Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto.

- (b.) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purposes of this section, be deemed to be her tonnage.
- (c.) Where a foreign ship has not been and cannot be measured according to British law, the surveyor

(a) To which must be added interest on the amounts from the date of the occurrence: see *The Northumbria* (1869), L. R. 3 A. & E. 6; *Smith v. Kirby* (1875), 1 Q. B. D. 131.

(b) The claimants for loss of life are alone entitled against £7 part of the £15. And they have a claim *pari passu* with the claimants for loss of cargo against the £8: *The Victoria* (1888), 13 P. D. 125; see also *The Crathie*, (1897) P. 178.

(c) Where, a ship having been in collision, her owners have got a decree in a limitation action, and have consented to judgment for the damage sustained by the other ship, the owners of cargo on either ship are not bound by the amount so fixed as the claim of the other ship, and may prove in claiming on the fund that it was excessive: *Van Etijk v. Somerville*, (1906) App. Cas. 489.

(d) The earliest provisions as to the measurement of a ship's tonnage appear to be in 1694 (5 & 6 Will. & Mary, c. 21, s. 2), and 1695 (6 & 7 Will. 3, c. 12, s. 10).

(e) The words in italics are amended by sect. 69 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), so as to read—"registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage."

general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3.) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

509. This part of this Act shall, unless the context otherwise requires, extend to the whole of Her Majesty's dominions.

63 & 64 Vict. c. 32.—MERCHANT SHIPPING (LIABILITY OF SHIP-OWNERS AND OTHERS) ACT, 1900.

1. The limitation of the liability of the owners of any ship set by sect. 503 of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management (*f*) of the ship.

(*f*) As to the words "navigation or management," which are also used in sect. 3 of the Harter Act, see pp. 269—272, *supra*.

APPENDIX IV.

General Average.

YORK-ANTWERP RULES, 1890.

Jettison of Deck Cargo.

I. No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Damage by Jettison and Sacrifice for the Common Safety.

II. Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Extinguishing Fire on Shipboard.

III. Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo (a), or to such separate packages of cargo, as have been on fire.

Cutting away Wreck.

IV. Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Voluntary Stranding.

V. When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore, shall be made good as general

(a) "Portion of . . . bulk cargo" does not mean the whole contents of one hold or cargo space, but only such part of the contents as has in fact been on fire: *Greenshields v. Stephens*, (1908) 1 K. B. 51 (C. A.).

average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average (b).

Carrying Press of Sail.—Damage to or loss of Sails.

VI. Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground, or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Damage to Engines in refloating a Ship.

VII. Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shewn to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Expenses lightening a Ship when Ashore, and consequent Damages.

VIII. When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Cargo, Ship's Materials, and Stores Burnt for Fuel.

IX. Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

Expenses at Port of Refuge, etc.

X. (a).—When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or part of it, the corresponding expenses of leaving (c) such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(t) See also *Austin Friars Co. v. Spillers & Bakers*, (1915) 3 K. B. 586.

(c) These words do not include the expenses of breaking ice in the approaches to the port: *Westoll v. Carter* (1898), 3 Com. Cas. 112.

(b).—The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c).—Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned, or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation, or of the abandonment of the voyage shall be admitted as general average.

(d).—If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair, or to her destination, or the cargo, or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transshipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Wages and Maintenance of Crew in Port of Refuge, etc.

XI. When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average (d). But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Damage to Cargo in Discharging, etc.

XII. Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

(d) Where, the ship being on monthly hire under a charter by which the owners pay the wages of master and crew, the owners recover a general average contribution for such wages in the port of refuge, the charterers are not entitled to recover back any of the monthly hire they have paid: *Howden v. Nutfield S.S. Co.* (1898), 3 Com. Cas. 56.

Deductions from Costs of Repairs.

XIII. In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.—

In the case of iron or steel ships, from date of original register to the date of accident,

| | |
|------------------------------------|--|
| Up to 1 year old (A.) | { All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted. |
| Between 1 and 3 years (B.) | { One-third to be deducted off repairs to and renewal of woodwork of hull, masts, and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connexions, steam cranes and connexions; other repairs in full. |
| Between 3 and 6 years (C.) | { Deductions as above under Clause B, except that one-sixth be deducted off ironwork of masts and spars and machinery (inclusive of boilers and their mountings). |
| Between 6 and 10 years (D.) | { Deductions as above under Clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging. |
| Between 10 and 15 years (E.) | { One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full. |
| Over 15 years (F.) | { One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables. |
| Generally (G.) | { The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use. |

In the case of wooden or composite ships,

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of ships generally,

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving-dock dues, including expenses of removals, cartages, use of shears, stages, and graving-dock materials, shall be allowed in full.

Temporary Repairs.

XIV. No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Loss of Freight.

XV. Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Amount to be made good for Cargo lost or damaged by Sacrifice.

XVI. The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Contributory Values.

XVII. The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure (e), to which shall be added the amount made good as a

(e) If a shipowner incurs expenditure at a port of refuge which is *prima facie* the subject of general average contribution under Rules X. and XI. *supra*, he can only claim that contribution under this Rule XVII. If, therefore, ship and cargo are both lost during the completion of the voyage he has no claim for contribution from the owners of cargo which, being lost, has no value "at the termination of the adventure." *Chellex v. Royal Commission*, (1922) 1 K. B. 12.

general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

Adjustment.

XVIII. Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

APPENDIX V.

THE UNITED STATES ACT OF CONGRESS, 1893.

THE Act of Congress, commonly known as the Harter Act, was passed in February, 1893. Before this legislation was adopted the American Courts had held that freedom of contract, as between goods-owner and carrier by sea, was limited in ways unknown to the English common law. A negligence clause in a bill of lading was held to be unenforceable and void as being against public policy (*a*). The same doctrine was applied in the case of a shipment on a British ship from Rotterdam to New York: on a claim for loss of the goods from negligence in the U.S. Court the shipowner was not protected by the negligence clause, though it was valid and effective both by English and Dutch law (*b*). And the principle of the last case was again applied in a case in which, in addition to the foregoing facts, it was expressly stipulated in the bill of lading that the contract should be construed according to English law (*c*).

The Harter Act has a double purpose. It makes it unlawful for the shipowner to insert certain exemptions from liability in his contract. It also provides certain statutory grounds of exemption in favour of the shipowner, subject to certain conditions. The Act obviously would be enforced in any United States Court in regard to any contract made in the U.S.A. for shipment from a United States port. The Courts have also held that it applies to any contract, wherever made, for the carriage of cargo to a port in the United States (*d*), and this would be the result even in regard to a bill of lading signed in England and expressly providing that the contract should be subject to English law (*e*).

In this book we are concerned only with the effect of the Harter Act upon cases arising in English Courts. If the English Court is dealing with an English contract (*e.g.* one for shipment on an English ship, and governed by the law of the flag) it will give effect to clauses valid by the English law, even though the contract was made in the United States. It will give no effect to the Harter Act as a statute (*e*).

(*a*) *The Montana* (1888), 129 U. S. Rep. 397. In that case goods were shipped at New York on a British ship for carriage to Liverpool, and under a bill of lading with a negligence clause. The vessel was stranded by negligent navigation on the coast of Wales, and it was held that the shipowner could not rely on the negligence clause.

(*b*) *The Guildhall* (1893), 58 Fed. Rep. 796.

(*c*) *Botany Worsted Mills v. Knott* (1897), 82 Fed. Rep. 471.

(*d*) *The Silvia* (1895), 68 Fed. Rep. 230; *The Frey* (1899), 92 Fed. Rep. 667.

(*e*) *In re Missouri S.S. Co.* (1889), 42 Ch. D. 321.

But in fact, by reason of sects. 2 and 5 of the Act, a British shipowner issuing a bill of lading in the United States is bound to incorporate the provisions of that Act. He does this by a clause, commonly called the "clause paramount," to the effect—"It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in the Act of Congress of the United States, approved 13th February, 1893."

By such a clause the British shipowner incorporates the Act as part of the terms of his contract. It follows that the English Courts have to give effect to the Act not as a statute, but as matter of contract, and must construe its provisions as part of the agreement made by the parties (*f*). The task of construing the contract is usually difficult, either because expressed exemptions in the bill of lading have to be disregarded as being inconsistent with the prohibitions of the Act, or because such exemptions repeat in different terms the exemptions provided by the Act

ACT OF CONGRESS, 1893 (HARTER ACT).

[Public No. 57.]

An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connexion with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document (g) any clause, covenant, or agreement, whereby it, he, or they shall be relieved from liability (h)

(*f*) "What we have to do is to construe the bill of lading, reading into it, as if they were written into it, the words of the Act of Congress . . . They introduce the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading." Lord Esher, M.R., *Dobell v. Rossmore*, (1895) 2 Q. B. at pp. 412, 413.

(*g*) In this Act, as in the Colonial Acts printed in Appendix VI., bills of lading are aimed at, but not charterparties—assuming that the vague phrase "shipping document" here, or in sect. 300 of the New Zealand Act, and "similar document of title" in sect. 4 of the Canadian Act, do not include a charterparty. If a charterparty is unaffected by this Act, or the others, it may presumably be in any terms, and so may a bill of lading issued to the charterer and operating in his hands as a mere receipt. If on coming into the hands of an indorsee the bill of lading becomes affected by the provisions of the Acts that is a more extraordinary example of a "springing contract" than any discussed in the *Note* to Article 18 on pp. 56—58.

for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect (i).

§ 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America, and foreign ports, her owner, master, agent, or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence, [to] (k) properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

§ 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence (l) to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied (m), neither the vessel, her owner or owners, agent, or

(i) See, for a discussion by the English Courts of these clauses, *Dobell v. S.S. Rossmore*, (1895) 2 Q. B. 408; *The Glenochil*, (1896) P. 10; *The Rodney*, (1900) P. 112; *Rowson v. Atlantic Transport Co.*, (1903) 2 K. B. 666 (C. A.), where regulation of the temperature in the refrigerating chambers was held "management of the vessel," partly on the ground that the refrigerating machinery also cooled the ship's provisions.

(k) This word "to" ought apparently to be inserted. It does not appear in official copies of the original Act.

(l) As sect. 1 in effect forbids any exceptions at all, the only exceptions available to the shipowner are those specified in the later part of sect. 3. But the right to rely on these specified exceptions is conditional on the shipowner having exercised due diligence to make the ship seaworthy. Thus the obligation to use due diligence, etc., is put in the same position as is the obligation at common law to perform the voyage without deviation (*cf.* Article 99): indeed it is given an even higher sanction, since the shipowner who deviates may still be able to rely on the common law exceptions of the act of God and the King's enemies, whereas the shipowner who has not exercised due diligence, etc., is deprived by this Act even of the benefit of these. The onus of proving that he has exercised due diligence, etc., and is therefore entitled to the benefit of the exceptions in sect. 3 lies upon the shipowner; the onus is not upon the cargo-owner to show that due diligence has not been exercised, in order to deprive the shipowner of the benefit of the exceptions. (So held by Bailhache, J., *Moore v. Lunn* (1922), 38 T. L. R. 649).

(m) The absolute warranty of seaworthiness is not, by the incorporation of the Harter Act, negatived, and a mere warranty to use due diligence to make the ship seaworthy substituted: *McFadden v. Blue Star Line*, (1905) 1 K. B. 697. "The incorporation of sect. 3 does

charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel (*n*), nor shall the vessel, her owner or owners, charterers, agents, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the things carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

§ 4. That it shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document stating, among other things, the marks necessary for identification (*o*), number of packages, or quantity, stating whether it be carrier's or shipper's weight and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

§ 5. That for a violation of any of the provisions of this Act, the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States.

§ 6. That this Act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised

nothing more than give immunity in respect of loss resulting from certain specified causes in the course of the voyage, provided the shipowner has exercised due diligence to make the ship seaworthy. The reference to due diligence is a mere qualification upon that immunity; it is not a limitation of the obligation under the warranty." *Channell, J., ibid.* at p. 707. The point has been similarly decided in the United States: *The Carib Prince* (1897), 170 U. S. Rep. 655.

(*n*) See note (*i*), *supra*, and pp. 269—272.

(*o*) Where the charterer agreed to do the loading, and supplied the marks for insertion in the bill of lading to the captain, the shipowner was entitled to an indemnity from the charterer in respect of liability incurred by reason of wrong marks to indorsees of the bills of lading, notwithstanding this section: *Elder Dempster & Co. v. Dunn* (1909)

Statutes of the United States (*p*), or any other Statute defining the liability of vessels, their owners, or representatives.

§ 7. Sections one and four of this Act shall not apply to the transportation of live animals.

§ 8. That this Act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13th, 1893.

(*p*) Sect. 4281 deals with liability for gold, &c., sect. 4282 with liability for loss by fire, and sect. 4283 with limitation of liability to the value of ship and freight,—much to the same purpose as §§ 502 and 503 of our Merchant Shipping Act, 1894.

APPENDIX VI.

AUSTRALIAN, NEW ZEALAND, AND CANADIAN ACTS.

THE American Harter Act has been imitated by the Parliaments of the Commonwealth of Australia, of New Zealand, and of the Dominion of Canada (*a*). The Australian Act (sect. 7) and the Canadian Act (sect. 12) impose a penalty on any master or agent who issues a bill of lading containing terms declared by the Acts to be illegal. As the issue of a bill of lading by a captain or agent in an Australian or Canadian port would be an act done within the Australian or Canadian jurisdiction, the effect of this is that the Acts have to be incorporated in bills of lading issued in Australia or Canada in the same way as the Harter Act (by reason of sect. 5 of that Act) is incorporated in bills of lading issued in the United States.

The New Zealand Act does not contain any equivalent clause imposing a penalty on the issue of bills of lading in contravention of the Act. It does declare (sect. 300) that certain provisions in a bill of lading shall be illegal (*b*), and this presumably would have effect in any proceedings before a New Zealand Court upon a bill of lading signed in New Zealand. But if a bill of lading were issued in New Zealand by the captain of a British ship containing terms declared to be illegal by section 300 (and there is nothing to prevent that happening), and it is sued upon in this country, the Court, presumably, would disregard the New Zealand Act, just as it would disregard the Harter Act if the captain of a British ship issued a bill of lading in the United States that did not incorporate the Harter Act. In the experience of the editors bills of lading are usually signed in New Zealand without any reference to, or incorporation of, the New Zealand Act.

SEA CARRIAGE OF GOODS ACT (1904) (AUSTRALIA).

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

1. This Act may be cited as the *Sea Carriage of Goods Act*, 1904.
2. This Act shall commence on the 1st January, One thousand nine hundred and five.
3. In this Act "goods" includes every description of wares, merchandise, and things, except live animals.

(*a*) And in Fiji by Ordinance XIV. of 1906. The Ordinance is substantially the same as the Australian Act of 1904. See *Australasian United Co. v. Hunt*, (1921) 2 A. C. 351.

(*b*) See also sect. 9 of the Act No. 37 of 1911.

4.—(1.) This Act shall apply only in relation to ships carrying goods from any place in Australia to any place outside Australia, or from one State to another State, and in relation to goods so carried, or received to be so carried, in those ships.

(2.) This Act shall not apply to any bill of lading or document made before the Thirtieth day of June, One thousand nine hundred and five, in pursuance of a contract or agreement entered into before the Seventeenth day of November, One thousand nine hundred and four.

5. Where any bill of lading or document (c) contains any clause, covenant, or agreement whereby—

(a) the owner, charterer, master, or agent of any ship, or the ship itself, is relieved from liability (d) for loss or damage to goods arising from the harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or arising from negligence, fault, or failure in the proper loading, stowage, custody, care, or delivery of goods received by them or any of them to be carried in or by the ship; or

(b) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation, are in any wise lessened, weakened, or avoided (e); or

(c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve and properly deliver them, are in any wise lessened, weakened, or avoided,

that clause, covenant, or agreement shall be illegal, null and void, and of no effect (f).

(c) *Query* if a charterparty is a "document" within this? It is certainly a document which may contain stipulations of the nature here dealt with. But if "charterparty or bill of lading" were intended it seems an obscure thing to say "bill of lading or document." See also footnote (g) on p. 482, *supra*.

(d) *Cf. Hordern v. Commonwealth Line*, (1917) 2 K. B. 420.

(e) A clause providing that no claim for loss or damage shall be enforceable unless made within seven days from the date when the cargo was, or should have been, landed, is void by reason of this section. *Australasian United Co. v. Hunt*, (1921) 2 A. C. 351.

(f) A bill of lading incorporated by a "clause paramount" the provisions of this Act. It also contained a clause providing (*inter alia*) that "any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owners, or any of them, or of the ship's husband or manager." *Held*, that this clause was not rendered null and void by sect. 5 of the Act so as to prevent the shipowner relying on it as a defence: *Charlton & Bagshaw v. Law* (1913), Sess. Cas. 317. *See quære*.

6. All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

7. The owner, charterer, master, or agent of a ship shall not—

(a) insert in any bill of lading or document any clause, covenant, or agreement declared by this Act to be illegal, or

(b) make, sign, or execute any bill of lading or document containing any clause, covenant, or agreement declared by this Act to be illegal.

Penalty: One Hundred Pounds.

8.—(1.) In every bill of lading with respect to goods, a warranty shall be implied that the ship shall be, at the beginning of the voyage, seaworthy in all respects and properly manned, equipped, and supplied.

(2.) In every bill of lading in respect to goods, unless the contrary intention appears (g), a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects (h) and properly manned, equipped, and supplied, neither the ship nor her owner, master, agent, or charterer shall be responsible for damage to or loss of the goods resulting from (i)—

(a) faults or errors in navigation, or

(b) perils of the sea or navigable waters, or

(c) acts of God, or the King's enemies, or

(d) the inherent defect, quality, or vice of the goods, or

(e) the insufficiency of package of the goods, or

(f) the seizure of the goods under legal process, or

(g) any act or omission of the shipper or owner of the goods, his agent, or representative, or

(g) The qualification "unless the contrary appears" can apparently only apply to a provision in a bill of lading by which the shipowner foregoes some of the exemptions given to him by this section, but not to one which purports to increase them. For any provision of the latter nature will be void under sect. 5, *supra*.

(h) The Harter Act makes the right of the shipowner to rely upon any exceptions at all conditional on his exercising due diligence to make the ship seaworthy. See footnote (l) on p. 483. This Australian Act makes his right to rely upon any exception of any kind conditional on the ship being in fact seaworthy. If therefore a ship is in fact unseaworthy by reason of the existence of some defect, which the most careful shipowner using the utmost diligence could not discover, he has in effect to insure the cargo against loss or damage by any cause whatever throughout the voyage, and even though the undiscovered defect in no way causes or contributes to the loss or damage.

(i) Presumably "fire" is an exception to be added to this list by virtue of §§ 502 and 509 of the Merchant Shipping Act, 1894. And so as to sect. 293 of the New Zealand Act of 1908.

- (h) saving or attempting to save life or property at sea, or
 (i) Any deviation in saving or attempting to save life or property at sea.

NEW ZEALAND—ACT No. 117 OF 1908.

Sects. 13 to 16 of this Act, as amended by sect. 2 of Act No. 25 of 1922, reproduce sects. 1 to 3 of the Bills of Lading Act, 1855, printed on p. 454, *supra*. The only variation is that (by the amendment in 1922) the equivalent of sect. 3 of the Bills of Lading Act, 1855, reads: "Every bill of lading in the hands of a *shipper* or consignee or indorsee for valuable consideration, &c."

NEW ZEALAND.—ACT No. 178 OF 1908 (k).

1. The Short Title of this Act is—"The Shipping and Seamen Act, 1908."

2.—(1) This Act . . . applies to all British ships registered at, trading with, or being at any place within the jurisdiction of New Zealand, and to the owners, masters, and crew thereof, except (l) as hereinafter provided.

PART XI.

LIABILITY OF SHIPOWNERS.

293. If the owner of any ship transporting merchandise or property to or from any port in New Zealand exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship, her owners, charterers, or agent shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management (m) of the ship, nor shall the ship, her owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under

(k) This Act repeals and re-enacts, in almost identical terms, an earlier Act, No. 96 of 1908. An Act (No. 58 of 1922) which amends this Act of 1908 has been passed in New Zealand, but has not yet received the Royal Assent.

(l) The exception is as regards His Majesty's ships and ships belonging to the Government of New Zealand.

(m) As to the words "navigation" and "management," see pp. 269—272, *supra*.

legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

300.—(1.) Where any bill of lading or shipping document contains—

(a) Any clause, covenant, or agreement whereby the manager, agent, master, or owner of any ship, or the ship itself, shall be relieved from liability (n) for loss or damage, arising from the harmful or improper condition of the ship's hold, negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge; or

(b) any covenant or agreement whereby the obligations of the owners of the ship to exercise due diligence to properly equip, man, provision, and outfit the ship, to make the hold of the ship fit and safe for the reception of cargo, and to make her seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, are in any wise lessened or avoided—

such clause, covenant, or agreement shall be null and void and of no effect, unless the Court before which any question relating thereto is tried shall adjudge the same to be just and reasonable (o).

(2.) This section shall not apply to the transportation of live animals.

302.—(1.) The agents in New Zealand of any ship not registered in New Zealand shall be deemed to be the legal representatives of the master and owner of the ship after the departure of the ship from the port at which she was discharged for the purpose of receiving and paying claims for short delivery or pillage of cargo, and the amount of any such claim may be recovered from such agents in any Court of competent jurisdiction:

Provided that it shall be lawful for such agents, by notice in writing delivered to the Collector not later than twenty-four hours before the departure of any ship, to decline to accept any responsibility under this section in respect of that ship, in which case the master and some other person approved by the Collector shall, before the ship is allowed her clearance, enter into a joint and several bond in a sum not exceeding the value of her cargo, as shown by the ship's papers, for the payment of any sum which, together with costs, may be recovered against the agents of such ship.

(n) Cf. *Hordern v. Commonwealth Line*, (1917) 2 K. B. 420.

(o) As to the similar provision in sect. 7 of the Railway and Canal Traffic Act, 1854, see p. 272, *supra*.

(2.) No proceedings for the recovery of any claim under this section shall be taken unless notice of the claim is given to the agents not later than fourteen days after the delivery of the cargo in respect of which the claim is made.

• 303. Every bill of lading issued by the manager, agent, master, or owner of a ship, and signed by any person purporting to be authorised to sign the same, shall be binding on the master and owner of the ship, as if the bill of lading had been signed by the master.

304. Nothing in this Part of this Act shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman, or, except the last preceding section, to extend to any British ship which is not recognised as a British ship within the meaning of this Act.

NEW ZEALAND.—ACT NO. 37 OF 1911.

(Shipping and Seamen Amendment Act, 1911).

§ 9. All parties to any bill of lading or other document relating to the carriage of goods from any place in New Zealand to any place outside New Zealand shall be deemed to have intended to contract according to the laws of New Zealand in force for the time being, and any stipulation or agreement to the contrary, or purporting to oust or restrict the jurisdiction of the Courts of New Zealand in respect of that bill of lading or document, shall be null and void.

NEW ZEALAND.—ACT NO. 25 OF 1922.

3.—(1.) In this section the expression “received for shipment bill of lading” means a shipping document issued in accordance with the provisions of this section, signed by a person purporting to be authorized to sign the same, and acknowledging that the goods to which the document relates have been received for shipment.

(2) No “received for shipment” bill of lading shall be issued (p):

- (a) Until the goods are in possession of the owner of the ship or of some person duly authorized on his behalf;
 - (b) Except for a named ship in which space has been actually reserved;
 - (c) Earlier than twenty-one days before the time when the ship is expected to be in port in readiness to load;
- but the issue of a “received for shipment” bill of lading shall be sufficient evidence until the contrary is proved that the requirements of this sub-section have been complied with.

(3.) Every "received for shipment" bill of lading shall contain (p) a provision that, in the event of the goods being unavoidably shut out from the named ship, the shipowner shall forward the goods by his next-available ship, or, at his option, by a ship of some other owner, or by a ship sailing within a specified number of days, but otherwise on the same terms and conditions, *mutatis mutandis*, as if the goods were actually shipped by the named ship.

(4) Every "received for shipment" bill of lading shall for all purposes be deemed to be a valid bill of lading with the same effect, and capable of negotiation in all respects, and with the same consequences, as if it were a bill of lading acknowledging that the goods to which it relates had been actually shipped on board.

CANADA.—WATER-CARRIAGE OF GOODS ACT (1910).

9 & 10 Edw. 7, c. 61.

1. This Act may be cited as *The Water-Carriage of Goods Act*.

2. In this Act, unless the context otherwise requires:—

(a) "*goods*" includes goods, wares, merchandise and articles of any kind whatsoever, except live animals, and lumber, deals, and other articles usually described as "*wood-goods*" (q);

(b) "*ship*" includes every description of vessel used in navigation not propelled by oars;

(c) "*port*" means a place where ships may discharge or load cargo.

3. This Act applies to ships carrying goods from any port in Canada to any other port in Canada, or from any port in Canada to any port outside of Canada, and to goods carried by such ships, or received to be carried by such ships.

4. Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby—

(a) the owner, charterer, master, or agent of any ship, or the ship itself, is relieved from liability (r) for loss or damage to goods arising from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship; or

(b) any obligations of the owner or charterer of any ship, to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold,

(p) There appears to be no penalty, or other sanction, for the enforcement of the prohibition in sub-sect. 2 or of the direction in sub-sect. 3.

(q) The definition in this paragraph in the original Act was repealed, and the above words in italics were substituted, by an amending Act of 1921 (1 & 2 Geo. 5, c. 27, s. 1).

(r) *Of. Hordern v. Commonwealth Line*, (1917) 2 K. B. 420.

refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided; or

- (c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened or avoided;

such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act.

5. Every bill of lading, or similar document of title to goods, relating to the carriage of goods from any place in Canada to any place outside of Canada shall contain a clause to the effect that the shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, this Act; and any stipulation or agreement purporting to oust or lessen the jurisdiction of any Court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

6. If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence (s) to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

(s) The Harter Act makes the right of the shipowner to rely upon any exceptions depend on his having exercised due diligence to make the ship seaworthy (see footnote (l) on p. 488). The New Zealand Act is to the same effect (see sect. 293 on p. 489). The Australian Act makes his right so to rely dependent on the ship being in fact seaworthy (see footnote (h) on p. 487). The result under the Harter Act and the New Zealand Act is that if a steamer is sent to sea with insufficient bunkers, and is sunk just after sailing by the gross negligence of another ship, the shipowner cannot plead "perils of the seas," i.e. the penalty follows, though the failure in no way causes or contributes to the loss. The Canadian Act is less drastic. Under sect. 6 the right to rely on exceptions of negligence and latent defect is made dependent on the fulfilment of the obligation to use due diligence, but the exceptions allowed or imposed by sect. 7 are unconditional. This would still have the result that if in the case put above the ship was sunk by the negligent navigation of her own master the shipowner must be liable, though the insufficiency of the bunkers was perfectly immaterial in relation to the loss of cargo. And the exceptions in sect. 7, e.g. fire, must presumably mean "not caused by negligence"; for if a fire was caused by negligence of the crew the condition in sect. 6 would be imposed. Fire caused by unseaworthiness will make the shipowner liable under sect. 7, unless he can discharge the onus of proving that the unseaworthiness, and consequently the fire, arose "without his actual fault or privity, or without the fault or neglect of his agents, servants or employees": *Royal Exchange Corporation v. Kingsley Co.*, (1923) App. Cas. 235.

7. The ship, the owner, charterer, agent or master shall not be held liable for loss (s) arising from fire, dangers of the sea, or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation (t), or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees (u).

8. The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package, unless a higher value is stated in the bill of lading or other shipping document, nor for any loss or damage whatever if the nature or value of such goods has been falsely stated by the shipper, unless such false statement has been made by inadvertence or error. The declaration by the shipper as to the nature and value of the goods shall not be considered as binding or conclusive on the ship, her owner, charterer, master or agent.

9. Every owner, charterer, master or agent of any ship carrying goods, shall on demand issue to the shipper of such goods a bill of lading showing, among other things, the marks necessary for identification as furnished in writing by the shipper, the number of packages or pieces, or the quantity or the weight, as the case may be, and the apparent order and condition of the goods as delivered to or received by such owner, charterer, master or agent; and such bill of lading shall be *prima facie* evidence of the receipt of goods as therein described.

10. (x).

11. When a ship arrives at a port where goods carried by the ship are to be delivered, the owner, charterer, master or agent

(t) It is not very apparent how "loss" can "arise from deviation," a comment which also applies to sect. 3 of the Harter Act, sect. 8 of the Australian Act, and sect. 293 of the New Zealand Act. The common law rule concerns loss arising during, or after, deviation (see Article 99). It is also difficult to understand what is meant by "other reasonable deviation." By the common law no deviation is permitted unless it is either (i.) to save life, or (ii.) allowed by the terms of the contract. If the text is based on an idea that deviation, though allowed by the contract, may be treated by a judge as "unreasonable," the implication seems impossibly great. And if this were clearly stated, by what criterion can a judge determine the reasonableness?

(u) The final sentence "or for loss arising . . . servants or employees," seems to make all the previous part of the section otiose. As to "fault or privity," see notes on sect 502 of the Merchant Shipping Act, 1894, *supra*, p. 471.

(x) The whole of this section is repealed by the amending Act of 1911 (1 & 2 Geo. 5, c. 27, s. 2).

of the ship shall forthwith give such notice as is customary (y) at the port, to the consignees of goods to be delivered there, that the ship has arrived.

12. Every one, who, being the owner, charterer, master or agent of a ship,—

- (a) inserts in any bill of lading or similar document of title to goods any clause, covenant or agreement declared by this Act to be illegal; or makes, signs, or executes any bill of lading or similar document of title to goods containing any clause, covenant or agreement declared by this Act to be illegal;

without incorporating *verbatim*, in conspicuous type, in the same bill of lading or similar document of title to goods, section four of this Act; or

- (b) refuses to issue to a shipper of goods a bill of lading as provided by this Act; or,

- (c) refuses or neglects to give the notice of arrival of the ship required by this Act;

is liable to a fine not exceeding one thousand dollars, with cost of prosecution: and the ship may be libelled therefor in any Admiralty District in Canada within which the ship is found.

(2.) Such proportion of any penalty imposed under this section as the Court deems proper, together with full costs, shall be paid to the person injured, and the balance shall belong to His Majesty for the public uses of Canada.

13. Every one who knowingly ships goods of an inflammable or explosive nature, or of a dangerous nature, without before shipping the goods making full disclosure in writing of their nature to, and obtaining the permission in writing of, the agent, master or person in charge of the ship, is liable to a fine of one thousand dollars.

14. Goods of an inflammable or explosive nature, or of a dangerous nature, shipped without such permission from the agent, master or person in charge of the ship, may, at any time before delivery, be destroyed or rendered innocuous, by the master or person in charge of the ship, without compensation to the owner, shipper or consignee of the goods; and the person so shipping the goods shall be liable for all damages directly or indirectly arising out of such shipment.

15. This Act shall not apply to any bill of lading or similar document of title to goods made pursuant to a contract entered into before this Act comes into force.

16. This Act shall come into force on the first day of September, one thousand nine hundred and ten.

(y) We know of no such custom in any English port. Notice is sometimes stipulated for, especially on through bills of lading, by a clause "Party to be notified . . .," in which case the duty arises by contract. Apart from this it is difficult to see how the shipowner, or master, can notify "the consignees," whose identity as indorsees of bills of lading must in most cases be entirely unknown to them.

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F.O.B.=free on board, the goods then being at the risk of the purchaser, who is liable for freight: (*Inglis v. Stock* (1885), 10 App. C. 268; cf. *Maine v. Sutcliffe* (1917), 23 Com. Cas. 216)...210

F.O.W.=first open water, for Baltic ports, after ice: (*Kempe v. Batt & Co.* (1888), 5 T. L. R. 27).

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